Ontario

PAY EQUITY REPORTS

VOLUME 1
1990

Pay Equity Hearings Tribunal

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PRACTICE NOTE NO. 1

ADJOURNMENTS SINE DIE

When the Tribunal adjourns a matter *sine die* on the agreement of the parties, the matter will be dismissed after expiry of one year from the date on which the adjournment is granted, without further notice to the parties, unless one or more parties request that the matter be scheduled for hearing within that period.

BULLETIN DE PRATIQUE N° 1

AJOURNEMENTS SINE DIE

Lorsque le tribunal ajourne une affaire sine die avec l'assentiment des parties, la question sera rejetée à l'expiration d'un an de la date à laquelle l'ajournement est prononcé, sans préavis ultérieur aux parties, à moins qu'une ou plusieurs parties exigent, entre-temps, que l'affaire soit entendue.

How to Use the Pay Equity Reports

The Pay Equity Reports contain selected decisions of the Pay Equity Hearings Tribunal, accompanied by summaries of the decisons in English and French. Each decision is also annotated with a list of the cases, statutes, rules and authorities referred to in it.

Each volume of the Pay Equity Reports contains a subject index in English and French comprised of abbreviated versions of the full case summaries.

Each volume of the Pay Equity Reports also contains separate consolidated indices of all cases, statutes, rules and authorities referred to throughout the volume. Any case referred to in this volume will appear in the Cases Referred To index. Following the citation for the case, one or more page number(s) will appear. The page number(s) refer(s) the user to the first page in any decision in which a reference to the case is made. The same method of page referencing is employed for the other indices as well.

In a practice that is consistent with the reports services of most labour relations tribunals, the Pay Equity Reports has adopted as the form of citation for its cases an abbreviated version of the employer's name. Where more than one decision in a volume would have the same name based on this nomenclature, the decisions are distinguished by adding to their citations a number reflecting the chronological order of the decisions. Because adopting the employer's name as the method of citing a reported decision may create difficulties for those of our users who might wish to search for cases involving a particular union or other employee organization, the Pay Equity Reports also contains an index of such organizations involved in proceedings before the Tribunal.

Consultation des Rapports en matière d'équité salariale

Le recueil des Rapports en matière d'équité salariale présente un certain nombre de décisions prises à l'issue des audiences du tribunal, conjointement avec un résumé de la décision en anglais et en français. Chaque décision porte annotation de la jurisprudence, des lois et règlements afférents et de la doctrine citée.

Chaque volume des Rapports en matière d'équité salariale comprend un index détaillé en anglais et en français reprenant en abrégé le résumé de l'affaire.

Il comprend également un index récapitulatif de toute la jurisprudence, des lois et règlements et de la doctrine citée dans le volume. Toute affaire citée dans le présent volume figurera dans l'index de la jurisprudence citée. La liste de chaque affaire est suivie par le numéro de la ou des pages correspondantes. Le numéro de page fait référence à la première occurrence dans laquelle la décision fait mention de l'affaire en question. La même méthode de numérotation de page a été suivie dans les autres index.

Selon les principes consacrés de la publication des recueils des décisions de la plupart des tribunaux compétents en matière de relations de travail, toute affaire citée dans les Rapports est identifiée par l'abréviation du nom de l'employeur. Si, dans un même recueil, plus d'une décision se voit attribuer un nom identique selon la nomenclature adoptée, on distingue une décision de l'autre en accompagnant chaque renvoi d'un numéro attestant leur ordre chronologique. Ayant jugé que la méthode visant à adopter le nom de l'employeur pour identifier une décision citée dans les Rapports peut poser un problème au lecteur qui chercherait les affaires mettant en cause une organisation syndicale donnée ou tout autre organisme représentant les employés, les Rapports comprennent également un index des organismes concernés dans les affaires portées devant le tribunal.

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Subjects

Application of Act

Employer

The issue before the Tribunal was whether the Regional Municipality of Haldimand-Norfolk ("the Municipality") is the employer of the Haldimand-Norfolk Regional Police such that the police are part of the Municipality's establishment. The Tribunal held that the police are part of the Regional Municipality's establishment.

Haldimand-Norfolk (No.3) *17*

Employer

The Union applied to have the Corporation of the City of London (the "City") and the County of Middlesex (the "County") declared the employer of the nurses at the Board of Health Middlesex-London Health Unit (the "Health Unit") for the purposes of pay equity. The City, the County and the Health Unit all took the position that the Health Unit alone was the appropriate employer under the *Act*. The Tribunal held that the Health Unit is the employer for the purposes of pay equity.

Middlesex and London *89*

Employer

The issue before the Tribunal was whether the Metropolitan Toronto Library Board (the "Board") or the Municipality of Metropolitan Toronto ("Metro") was the employer of the staff at the Metropolitan Toronto Library. The applicant argued that the employer was Metro. Both Metro and the Board submitted that the Board was the employer.The Tribunal held that Metro is the employer for pay equity purposes.

Metropolitan Toronto Library Board *112*

Establishment

The issue before the Tribunal was whether the Regional Municipality of Haldimand-Norfolk ("the Municipality") is the employer of the Haldimand-Norfolk Regional Police such that the police are part of the Municipality's establishment.The Tribunal held that the police are part of the Regional Municipality's establishment.

Haldimand-Norfolk (No.3) *17*

Comparisons

Job Class

Two school boards ("the Boards") applied for a hearing before the Tribunal with respect to an order of a Review Officer which found that there were seven job classes for elementary teachers. The Boards argued that all elementary classroom teachers constitute one job class on the basis that they all occupy one position. Several groups of elementary teachers ("the Federations") opposed this application. The Federations argued that there were seven distinct job classes, corressponding to the seven job categories on the compensation grid.The Tribunal held that there were seven job classes for elementary teachers.

Wentworth County Board of Education *132*

Evidence

Experts

The Applicant Union filed a complaint against the Respondent Employer alleging that the comparison system tabled by the Respondent was not gender neutral. In support of its case, the Applicant sought to introduce expert opinion on a range of issues pertaining to women's work. There was dispute between the parties as to both the qualifications of the witness and the relevance of her proposed evidence. The Tribunal qualified the witness as an expert and limited the scope of her testimony.

Haldimand-Norfolk (No.4) *49*

Interpretation

Purpose of Act

Discrimination

The Act is a statute having the specific purpose of redressing systemic wage discrimination. It has both human rights and labour relations elements.

Haldimand-Norfolk (No.3) *17*

The **Act** contains labour relations as well as anti-discrimination components. In interpreting human rights or anti-discrimination legislation, one must, while ensuring that the words are given their plain meaning, nevertheless give full recognition and effect to the rights which the statute aims to promote.

Middlesex and London *89*

As "employer" is not defined by the *Act*, the test developed by the Tribunal must be consistent with the purpose of the *Act*, and fit within its context. The purpose of the *Act* is to redress systemic wage discrimination in the compensation of employees employed in female job classes in Ontario.

Metropolitan Toronto Library Board *112*

Labour Relations

The Act is a statute having the specific purpose of redressing systemic wage discrimination. It has both human rights and labour relations elements.

Haldimand-Norfolk (No.3) 17

The **Act** contains labour relations as well as anti-discrimination components. In interpreting human rights or anti-discrimination legislation, one must, while ensuring that the words are given their plain meaning, nevertheless give full recognition and effect to the rights which the statute aims to promote.

Middlesex and London *89*

As "employer" is not defined by the *Act*, the test developed by the Tribunal must be consistent with the purpose of the *Act*, and fit within its context. The purpose of the *Act* is to redress systemic wage discrimination in the compensation of employees employed in female job classes in Ontario.

Metropolitan Toronto Library Board *112*

Judicial Review

Error of Law

The Haldimand-Norfolk Regional Board of Commissioners of Police (the "Police") and the Regional Municipality of Haldimand-Norfolk (the "Municipality") applied for judicial review to quash and set aside the decision of the Tribunal in *Haldimand-Norfolk* (30 June 1989), 0001-89 (P.E.H.T.) [now reported *Haldimand-Norfolk (No.3)* (1989), 1 P.E.R. 17.] wherein the Tribunal held that the Police are part of the establishment of the Municipality and that the Municipality is the employer of the Police for pay equity purposes. The Divisional Court dismissed the application.

Haldimand-Norfolk and Ontario Nurses' Association, Re *188*

Pay Equity Process

Negotiation

Good Faith - Disclosure

The Applicant alleged that the Respondent had breached its duty to negotiate pay equity in good faith by failing to disclose certain information requested during bargaining. The

Tribunal considered: 1) what information the employer was required to disclose; and 2) when in the bargaining process it was obliged to release information. The Tribunal ordered partial disclosure.

Cybermedix Health Services Ltd. *41*

Pay Equity Process
Pay Equity Plan

Several groups of elementary teachers ("the Federations") applied for a hearing before the Tribunal with respect to an order of a Review Officer which found that two separate pay equity plans were required for elementary school teachers: one for the male teachers represented by Ontario Public School Teachers' Federation ("O.P.S.T.F."), the other for the female teachers represented by the Federation of Women Teachers' Association of Ontario ("F.W.T.A.O."). Two school boards ("the Boards") opposed this application. The Federations argued that only one plan was required for the bargaining unit consisting of all male and female elementary teachers. The Tribunal held that one pay equity plan was required.

Wentworth County Board of Education *132*

PEHT
Hearing
Jurisdiction

At the time the application for hearing was filed with the Tribunal, no settlement had been reached and the review officer had not yet made an order or referred the matter to the Tribunal. The preliminary issue was whether the Tribunal had the jurisdiction to hear and determine the case. The Tribunal held that it had jurisdiction to hear and determine the case.

Haldimand-Norfolk (No.1) *1*

Jurisdiction

The applicant sought to strike out certain portions of the Response on grounds that it contained fresh allegations against the applicant that were not brought at the review services stage. The Tribunal struck portions of the Response.

Haldimand-Norfolk (No.2) *13*

Jurisdiction

A preliminary issue was raised as to whether the Tribunal had jurisdiction to deal with the complaints. The Tribunal held that it had jurisdiction to deal with the complaints.

Women's College Hospital (No.1) *53*

PEHT
Hearing
Procedure

An issue arose as to the nature of proceedings before the Tribunal. A proceeding before the Tribunal is not an appeal, but rather is a hearing de novo on the issues in dispute. Evidence on those issues must be called at the hearing by the parties and be subject to cross-examination.

Cybermedix Health Services Ltd. *41*

Practice and Procedure
Intervention

The Applicant Union alleged that the Respondent Hospital had failed to bargain in good faith and to endeavour to agree upon a gender neutral comparison system and a pay equity plan contrary to s.14 of the Act. The Hospital counterclaimed against the Union on the same grounds, and the two hearings were consolidated. SKEW, a job evaluation consulting company, applied to intervene claiming that it had an interest in the subject matter of the proceedings. It argued that since the gender neutrality of its plan was at issue in the case, the Tribunal's decision could have an adverse impact upon it in a commercial sense; it might suffer a loss in reputation, revenues and livelihood. The Tribunal dismissed SKEW's application to intervene as a party.

Women's College Hospital (No.1) ***53***

Intervention

Two school boards ("the Boards") applied for a hearing before the Tribunal with respect to an order of a Review Officer which found that there were seven job classes for elementary teachers. Several groups of elementary teachers ("the Federations") opposed this application. Two groups of secondary school teachers ("O.S.S.T.F.") applied to intervene in the proceedings on the basis that they would be substantially and directly affected by the decision because it would also determine job class for secondary school teachers. The Tribunal permitted limited intervention by O.S.S.T.F..

Wentworth County Board of Education ***132***

Intervention

The Applicant Union alleged that the Respondent Municipality had failed to bargain in good faith and to endeavour to agree upon a gender neutral comparison system and a pay equity plan contrary to s.14 of the *Act*. M., a job evaluation consulting company, applied to intervene in the proceedings on the basis that its business could be adversely affected by the decision of the Tribunal. The Union opposed the application and the Municipality supported it. The Tribunal dismissed M.'s application to intervene.

Haldimand-Norfolk (No.5) ***77***

Notice

The Applicant Union filed a complaint against the Respondent Health Centre, and the matter was referred to the Tribunal by the Pay Equity Office, Review Services. At the pre-hearing conference dealing with that matter, the Health Centre filed a complaint against the Union with the Tribunal. At the first day of hearing, the Union objected to the Tribunal's hearing the complaint of the Health Centre on the grounds that the allegations contained therein had not first been before Review Services. The Tribunal ordered that notice be given to the Pay Equity Office before it would determine whether it had jurisdiction to hear the Health Centre's complaint.

Grey Bruce Regional Health Centre ***86***

Pleadings
Application to Strike

The applicant sought to strike out certain portions of the Response on grounds that it contained fresh allegations against the applicant that were not brought at the review services stage. The Tribunal struck portions of the Response.

Haldimand-Norfolk (No.2) ***13***

Pleadings
Application to Strike

A motion was made to strike certain paragraphs of the Hospital's Response on the grounds that it is a request in the nature of separate and independent relief which is not permitted in a response. The Tribunal reserved on the motion till it heard the evidence and final argument.

Women's College Hospital (No.1) ***53***

Reconsideration

PMS&K, a consulting company, applied to intervene in an application in which the Aiken Plan, a job evaluation system which it had designed and sold, was involved. That application was denied in a decision of the Tribunal dated October, 17, 1989 [now reported, *Women's College Hospital* (1989), 1 P.E.R. 53]. PMS&K applied to the Tribunal to reconsider that decision. After PMS&K had filed this second application, but before the merits were heard, the Applicant Union in the case involving the plan, filed several other applications all of which were premised on the same ground: that each of the respondents had violated the *Act* by proposing a gender-biased comparison system. The Union sought to have these other applications consolidated with its initial application. The Tribunal held with respect to the procedural motion that two of the new applications would be heard together with the initial application, and the remaining ones were adjourned *sine die*. The Tribunal denied the application to reconsider its earlier decision.

Women's College Hospital (No.2) *178*

Review Services Order

Application to Stay

The applicant sought to stay the review services order on the grounds that it revealed a prima facie error. Stays of review officer orders are not provided for in the Act. The Tribunal dismissed the application to stay.

Haldimand-Norfolk (No.2) *13*

Sujets

Champ d'application de la Loi

Employeur

Le Tribunal devait décider si la municipalité régionale de Haldimand-Norfolk («la municipalité») était l'employeur de la police régionale de Haldimand-Norfolk afin de déterminer si la police fait partie de l'établissement que constitue la municipalité régionale. Le Tribunal a décidé que la police faisait effectivement partie de l'établissement que constitue la municipalité régionale.

Haldimand-Norfolk (No.3) *17*

Employeur

Le syndicat a demandé que la municipalité de London (la «ville») et le comté de Middlesex (le «comté») soient reconnus l'employeur des infirmières du Conseil de santé de la circonscription sanitaire de Middlesex-London (la «circonscription sanitaire») aux fins de l'équité salariale. La ville, le comté et la circonscription sanitaire estimaient que seule la circonscription sanitaire était l'employeur approprié en vertu de la Loi. Le Tribunal a statué que la circonscription sanitaire est l'employeur aux fins de l'équité salariale.

Middlesex and London *89*

Employeur

La question dont était saisi le Tribunal était la suivante : lequel du Conseil des bibliothèques de la communauté urbaine de Toronto (le «conseil») ou de la municipalité de la communauté urbaine de Toronto (la «communauté») est l'employeur du personnel de la bibliothèque de la communauté urbaine de Toronto. Le syndicat prétendait que c'était la communauté. La communauté et le conseil estimaient que c'était le conseil. Le Tribunal a statué que la communauté était l'employeur aux fins de l'équité salariale.

Metropolitan Toronto Library Board *112*

Employeur

La Commission régionale de police de Haldimand-Norfolk (la «police») et la municipalité régionale de Haldimand-Norfolk (la «municipalité») ont présenté une requête en révision judiciaire pour faire annuler la décision que le Tribunal a rendue dans Haldimand-Norfolk (30 June 1989), 0001-89 (P.E.H.T.) [citée maintenant dans Haldimand-Norfolk (No. 3) (1989), 1 P.E.R. 18]. Dans cette cause, le Tribunal a conclu que la police faisait partie de l'établissement que constitue la municipalité et que la municipalité était l'employeur de la police aux fins de l'équité salariale. La Cour divisionnaire a rejeté la requête.

Haldimand-Norfolk and Ontario Nurses' Association, Re *188*

Établissement

Le Tribunal devait décider si la municipalité régionale de Haldimand-Norfolk («la municipalité») était l'employeur de la police régionale de Haldimand-Norfolk afin de déterminer si la police fait partie de l'établissement que constitue la municipalité régionale. Le Tribunal a décidé que la police faisait effectivement partie de l'établissement que constitue la municipalité régionale.

Haldimand-Norfolk (No.3) *17*

Partie

Le syndicat requérant prétendait que l'intimé, l'hôpital, n'avait pas négocié de bonne foi et ne s'était pas efforcé de convenir d'un système non sexiste de comparaison et d'un programme d'équité salariale contrairement à l'article 14 de la Loi. L'hôpital a déposé une demande reconventionnelle à l'encontre du syndicat pour les mêmes motifs et les deux audiences ont été réunies. SKEW, un cabinet d'experts-conseils dans le domaine de l'évaluation des emplois, a déposé une requête en intervention en faisant valoir qu'il avait un intérêt dans l'instance. Il prétendait qu'étant donné que le caractère non sexiste de son programme était en cause, la décision du Tribunal pourrait avoir des conséquences néfastes sur ses affaires. Toujours selon SKEW, la décision du Tribunal pourrait nuire à sa réputation et entraîner une diminution de ses revenus. Le Tribunal a rejeté la requête en intervention de SKEW.

Women's College Hospital (No.1) *53*

Partie

Le syndicat requérant prétend que l'intimé, la municipalité, n'a pas négocié de bonne foi et ne s'est pas efforcée de convenir d'un système non sexiste de comparaison et d'un programme d'équité salariale contrairement à l'article 14 de la Loi. M., un cabinet d'experts-conseils dans le domaine de l'évaluation des emplois, a demandé de participer à l'instance à titre d'intervenant en faisant valoir que la décision du Tribunal pourrait avoir des conséquences néfastes sur ses affaires. Le syndicat s'opposait à la requête du cabinet et la municipalité l'appuyait. Le Tribunal a rejeté la requête en intervention de M.

Haldimand-Norfolk (No.5) *77*

Partie

Deux conseils scolaires (les «conseils») ont demandé de se faire entendre devant le Tribunal en ce qui concerne un ordre d'un agent de révision portant que les enseignants du palier élémentaire appartenaient à sept catégories d'emplois distinctes. Plusieurs groupements d'enseignants de ce palier (les «fédérations») se sont opposés à cette requête. Deux groupes d'enseignants du palier secondaire (la «FEÉSO») ont déposé une requête en intervention dans l'instance en faisant valoir que la décision les toucherait considérablement et directement étant donné qu'elle aurait également pour conséquence de définir des catégories d'emplois s'appliquant aux enseignants du palier secondaire. Le Tribunal a permis à la FEÉSO d'intervenir de façon limitée.

Wentworth County Board of Education *132*

Comparaisons

Catégories d'emplois

Deux conseils scolaires (les «conseils») ont demandé de se faire entendre devant le Tribunal en ce qui concerne un ordre d'un agent de révision portant que les enseignants du palier élémentaire appartenaient à sept catégories d'emplois distinctes. Les conseils maintenaient que tous les enseignants du palier élémentaire appartenaient à une catégorie d'emplois pour le motif qu'ils occupaient tous un poste. Plusieurs groupements d'enseignants du palier élémentaire (les «fédérations») se sont opposés à cette requête en faisant valoir qu'il existait sept catégories d'emplois distinctes correspondant aux sept catégories figurant sur la grille de rétribution. Le Tribunal a décidé que les enseignants du palier élémentaire appartenaient à sept catégories d'emplois distinctes.

Wentworth County Board of Education *132*

Interprétation

Objet de la Loi

Discrimination

L'objet particulier de la Loi est d'éliminer la discrimination systémique entre les sexes en ce qui concerne la rétribution du travail. La Loi comprend des dispositions ayant trait à la fois aux droits de la personne et aux relations de travail.

Haldimand-Norfolk (No.3) *17*

Discrimination

La Loi comprend des dispositions ayant à la fois trait aux relations de travail et aux mesures anti-discriminatoires. Lorsqu'on interprète les textes législatifs concernant les droits de la personne ou les mesures anti-discriminatoires, il importe, tout en veillant à ce que les mots gardent leur acception normale, d'accorder néanmoins toute leur valeur et toute leur validité aux droits que la loi vise à promouvoir.

Middlesex and London *89*

Discrimination

Étant donné que la Loi ne définit pas le terme «employeur», le test élaboré par le Tribunal doit être compatible avec l'objet de la Loi et s'inscrire dans ce contexte. L'objet de la

Loi est d'éliminer la discrimination systémique entre les sexes en ce qui concerne la rétribution du travail effectué par les employés dans les catégories d'emplois à prédominance féminine en Ontario.

Metropolitan Toronto Library Board 112

Relations de travail

L'objet particulier de la Loi est d'éliminer la discrimination systémique entre les sexes en ce qui concerne la rétribution du travail. La Loi comprend des dispositions ayant trait à la fois aux droits de la personne et aux relations de travail.

Haldimand-Norfolk (No.3) 17

Relations de travail

La Loi comprend des dispositions ayant à la fois trait aux relations de travail et aux mesures anti-discriminatoires. Lorsqu'on interprète les textes législatifs concernant les droits de la personne ou les mesures anti-discriminatoires, il importe, tout en veillant à ce que les mots gardent leur acception normale, d'accorder néanmoins toute leur valeur et toute leur validité aux droits que la loi vise à promouvoir.

Middlesex and London 89

Relations de travail

Étant donné que la Loi ne définit pas le terme «employeur», le test élaboré par le Tribunal doit être compatible avec l'objet de la Loi et s'inscrire dans ce contexte. L'objet de la Loi est d'éliminer la discrimination systémique entre les sexes en ce qui concerne la rétribution du travail effectué par les employés dans les catégories d'emplois à prédominance féminine en Ontario.

Metropolitan Toronto Library Board 112

Pratique et procédure

Actes de procédure

Demande de rayer des parties de la défense

Le requérant voulait faire rayer certaines parties de la défense pour le motif qu'elle comprenait de nouvelles allégations contre lui qui n'avaient pas été mentionnées à l'étape de la révision. Le Tribunal a rayé des parties de la défense.

Haldimand-Norfolk (No.2) 13

Demande pour rayer certaînes dispositions

Une motion a été déposée en vue de rayer certaines dispositions de la défense de l'hôpital pour le motif qu'il s'agit d'une demande de recours séparé et indépendant qui n'est pas permise dans une défense. Le Tribunal a remis toute décision sur la motion jusqu'à ce qu'il ait entendu la preuve et la plaidoirie finale.

Women's College Hospital (No.1) 53

Avis

Le syndicat requérant a déposé une plainte contre l'intimé, le Centre de santé. Les Services de révision du Bureau de l'équité salariale ont saisi le Tribunal de cette affaire. Lors de la conférence préparatoire à l'audience qui a eu lieu à ce sujet, le Centre de santé a déposé une plainte contre le syndicat auprès du Tribunal. Pendant la première journée d'audience, le syndicat s'est opposé à ce que le Tribunal entende la plainte du Centre de santé en faisant valoir que les allégations qu'elle renfermait n'avaient pas d'abord été présentées aux Services de révision. Le Tribunal a ordonné qu'un avis soit donné au Bureau de l'équité salariale avant de décider s'il avait compétence pour entendre la plainte du Centre de santé.

Grey Bruce Regional Health Centre 86

Intervention

Le syndicat requérant prétend que l'intimé, la municipalité, n'a pas négocié de bonne foi et ne s'est pas efforcée de convenir d'un système non sexiste de comparaison et d'un programme d'équité salariale contrairement à l'article 14 de la Loi. M., un cabinet d'experts-conseils dans le domaine de l'évaluation des emplois, a demandé de participer à l'instance à titre d'intervenant en faisant valoir que la décision du Tribunal pourrait avoir des conséquences néfastes sur ses affaires. Le syndicat s'opposait à la requête du cabinet et la municipalité l'appuyait. Le Tribunal a rejeté la requête en intervention de M.

Haldimand-Norfolk (No.5) *77*

Intervention

Champ d'application de la Loi – PartiePratique et procédure – Intervention Deux conseils scolaires (les «conseils») ont demandé de se faire entendre devant le Tribunal en ce qui concerne un ordre d'un agent de révision portant que les enseignants du palier élémentaire appartenaient à sept catégories d'emplois distinctes. Plusieurs groupements d'enseignants de ce palier (les «fédérations») se sont opposés à cette requête. Deux groupes d'enseignants du palier secondaire (la «FEÉSO») ont déposé une requête en intervention dans l'instance en faisant valoir que la décision les toucherait considérablement et directement étant donné qu'elle aurait également pour conséquence de définir des catégories d'emplois s'appliquant aux enseignants du palier secondaire. Le Tribunal a permis à la FEÉSO d'intervenir de façon limitée.

Wentworth County Board of Education *132*

Ordre des Services de révision

Requête en suspension

Le requérant a tenté d'obtenir une suspension de l'ordre des Services de révision en faisant valoir qu'il contenait une erreur prima facie. La Loi ne prévoit pas la suspension des ordres des agents de révision. Le Tribunal a rejeté la requête en suspension.

Haldimand-Norfolk (No.2) *13*

Réexamen

PMS&K, un cabinet d'experts-conseils, a présenté une requête en intervention dans le cadre d'une requête concernant le plan Aiken, un mode d'évaluation d'emplois qu'il a conçu et mis en vente. Dans sa décision du 17 octobre 1989 [citée maintenant dans Women's College Hospital (1989), 1 P.E.R. 53], le Tribunal a rejeté la requête. Le cabinet a présenté au Tribunal une requête en réexamen de sa décision. Après le dépôt de la deuxième requête mais avant l'audition de son bien-fondé, le syndicat requérant dans l'affaire mettant en cause le plan a déposé plusieurs autres requêtes toutes fondées sur le même motif : chacun des intimés avait enfreint la Loi en proposant un système sexiste de comparaison. Le syndicat a voulu faire réunir ces autres requêtes à sa requête initiale. Le Tribunal a décidé en ce qui concerne la motion de procédure que deux des nouvelles requêtes seraient entendues en même temps que la requête initiale et que les autres seraient reportées à une date indéterminée. Le Tribunal n'a pas accueilli la requête en réexamen de sa décision antérieure.

Women's College Hospital (No.2) *178*

Preuves

Experts

Le syndicat requérant a déposé une plainte contre l'employeur, l'intimé, alléguant que le système de comparaison déposé par l'intimé avait un caractère sexiste. Pour appuyer sa cause, le requérant a voulu produire l'opinion d'une personne experte sur un éventail de questions ayant trait au travail des femmes. Les parties ne s'entendaient pas sur les compétences professionnelles du témoin en question ni sur la pertinence du témoignage proposé. Le Tribunal a reconnu le témoin comme témoin expert et restreint l'envergure de son témoignage.

Haldimand-Norfolk (No.4) *49*

Processus d'équité salariale

Négociation

Mauvaise Foi - Divulgation

Le requérant prétend que l'intimé a manqué à son devoir de négocier un programme d'équité salariale de bonne foi car il n'a pas divulgué certains renseignements qu'on lui avait demandés pendant les négociations. Le Tribunal a étudié les questions suivantes:

1) quels renseignements l'employeur était-il tenu de divulguer; et 2) à quelle étape des négociations était-il tenu de faire connaître ces renseignements. Le Tribunal a ordonné une divulgation partielle des renseignements.

Cybermedix Health Services Ltd. *41*

Programme d'équité salariale

Plusieurs groupements d'enseignants du palier élémentaire (les «fédérations») ont demandé de se faire entendre devant le Tribunal en ce qui concerne un ordre d'un agent de révision portant que deux programmes d'équité salariale distincts sont nécessaires à l'égard des enseignants du palier élémentaire : un pour les membres masculins du personnel enseignant représentés par la Fédération des enseignants des écoles publiques de l'Ontario (la «Fédération des enseignants») et un autre pour les enseignantes représentées par la «Federation of Women Teachers' Association of Ontario (l'«Association des enseignantes»). Deux conseils scolaires (les «conseils») se sont opposés à cette requête. Les fédérations maintenaient qu'un seul programme d'équité salariale était nécessaire à l'égard de l'unité de négociation regroupant tous les enseignants et enseignantes du palier élémentaire. Le Tribunal a décidé qu'un programme d'équité salariale était nécessaire.

Wentworth County Board of Education *132*

Révision judiciaire

Erreur de droit

La Commission régionale de police de Haldimand-Norfolk (la «police») et la municipalité régionale de Haldimand-Norfolk (la «municipalité») ont présenté une requête en révision judiciaire pour faire annuler la décision que le Tribunal a rendue dans Haldimand-Norfolk (30 June 1989), 0001-89 (P.E.H.T.) [citée maintenant dans *Haldimand-Norfolk (No. 3)* (1989), 1 P.E.R. 18]. Dans cette cause, le Tribunal a conclu que la police faisait partie de l'établissement que constitue la municipalité et que la municipalité était l'employeur de la police aux fins de l'équité salariale. La Cour divisionnaire a rejeté la requête.

Haldimand-Norfolk and Ontario Nurses' Association, Re *188*

T.É.S.

Audience

Compétence

Au moment où la requête pour obtenir une audience a été déposée auprès du Tribunal, aucun règlement n'était intervenu et l'agente de révision n'avait pas encore donné d'ordre ou renvoyé la question au Tribunal. La question préliminaire consistait à déterminer si le Tribunal avait compétence pour trancher le différend. Le Tribunal a statué qu'il avait compétence pour trancher le différend.

Haldimand-Norfolk (No. 1) *1*

Compétence

Le requérant a tenté d'obtenir une suspension de l'ordre des Services de révision en faisant valoir qu'il contenait une erreur prima facie. La Loi ne prévoit pas la suspension des ordres des agents de révision. Le Tribunal a rejeté la requête en suspension.

Haldimand-Norfolk (No. 2) *13*

Compétence

Une question préliminaire a été soulevée quant à la question de savoir si le Tribunal avait compétence pour traiter des plaintes. Le Tribunal a statué qu'il avait compétence pour traiter des plaintes.

Women's College Hospital (No. 1) *53*

Compétence

Le syndicat requérant a déposé une plainte contre l'intimé, le Centre de santé. Les Services de révision du Bureau de l'équité salariale ont saisi le Tribunal de cette affaire. Lors de la conférence préparatoire à l'audience qui a eu lieu à ce sujet, le Centre de santé a déposé une plainte contre le syndicat auprès du Tribunal. Pendant la première journée d'audience, le syndicat s'est opposé à ce que le Tribunal entende la plainte du Centre de santé en faisant valoir que les allégations qu'elle renfermait n'avaient pas d'abord été présentées aux Services de révision. Le Tribunal a ordonné qu'un avis soit donné au Bureau de l'équité salariale avant de décider s'il avait compétence pour entendre la plainte du Centre de santé.

Grey Bruce Regional Health Centre *86*

Procédure

Une question a été soulevée en ce qui concerne la nature des instances devant le Tribunal. Une instance devant le Tribunal n'est pas un appel, mais plutôt une nouvelle audience relative aux questions en litige. Lors de l'audience, les parties doivent convoquer des témoins en ce qui concerne les questions en litige et ces témoins peuvent être contre-interrogés.

Cybermedix Health Services Ltd. *41*

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0001-89 Ontario Nurses Association, Applicant v. Regional Municipality of **Haldimand-Norfolk**, Respondent; Haldimand-Norfolk Regional Board of Commissioners of Police, Other Party (No. 1)

Before: Janis Sarra, Vice-Chair and Members Sharon Laing and Geri Sheedy

Appearances: Mary Cornish, Felicity Briggs, Noelle Andrews, Lawrence Walter and Anne Marie Delorey for the Applicant, Ontario Nurses Association; Paul Wearing and Bill McDougall for the Respondent, Regional Municipality of Haldimand-Norfolk; David Ivey and Stan Floras for the Haldimand-Norfolk Regional Board of Commissioners of Police.

PEHT - Hearing - Jurisdiction

At the time the application for hearing was filed with the Tribunal, no settlement had been reached and the review officer had not yet made an order or referred the matter to the Tribunal. The preliminary issue was whether the Tribunal had the jurisdiction to hear and determine the case.

The Tribunal held that it had jurisdiction to hear and determine the case.

Where a complaint is filed with the Pay Equity Office, a review officer is required to investigate the matter and may endeavour to effect a settlement. The Tribunal is required by s. 25(1)(a) to hold a hearing where a review officer has been unable to effect a settlement and has not made an order under s. 24(3). It is for the Tribunal to decide whether these conditions have been met. In determining whether the review officer has been able to effect a settlement the Tribunal is not to evaluate the substance of the settlement process but is to consider whether there has been a reasonable opportunity for a settlement to occur. Factors to be considered include: the nature and extent of pay equity bargaining prior to the application for review services; the length of time at review services; the nature and complexity of the issues in dispute; the willingness of both parties to continue settlement discussions; and the mandatory time frames under the *Act*. In this case there had been a reasonable opportunity to settle and a settlement was not effected. As no order had been made under s.24(3), both of the requirements of s. 25(1)(a) had been met and the Tribunal had jurisdiction to hear the complaint.

After the application for hearing had been filed but before the hearing was held, the review officer made an order. Therefore, the Tribunal also had jurisdiction to hear the case under s. 25(1)(b). The Applicant was permitted to amend its application to include the request for hearing pursuant to s. 24(6) and s. 25(1)(b), as there was no prejudice to the other parties.

With the agreement of the Applicant and Respondent the Tribunal directed that the Haldimand-Norfolk Regional Board of Commissioners of Police had party status for determining two issues: the scope of the establishment; and the jurisdiction of the Tribunal.

T.É.S. - Audience - Compétence

Au moment où la requête pour obtenir une audience a été déposée auprès du Tribunal, aucun règlement n'était intervenu et l'agente de révision n'avait pas encore donné d'ordre ou renvoyé la question au Tribunal. La question préliminaire consistait à déterminer si le Tribunal avait compétence pour trancher le différend.

Le Tribunal a statué qu'il avait compétence pour trancher le différend.

Si une plainte est déposée auprès du Bureau de l'équité salariale, un agent de révision est tenu de mener une enquête et peut tenter d'amener les parties à accepter un règlement. L'alinéa 25 (1) a) oblige le Tribunal à tenir une audience si l'agent de révision n'a pu amener les parties à accepter un règlement et n'a pas donné d'ordre en vertu du paragraphe 24 (3). Il incombe au Tribunal de décider si ces conditions ont été remplies. Lorsqu'il détermine si l'agent de révision a pu amener les parties à accepter un règlement, le Tribunal ne doit pas évaluer la substance du processus de règlement mais il doit déterminer s'il existait une possibilité raisonnable de faire intervenir un règlement. Le Tribunal doit tenir compte des facteurs suivants : la nature et l'envergure des négociations en matière d'équité salariale avant la requête en vue d'obtenir les services d'un agent de révision, la durée de la période que les parties ont passée devant l'agent de révision, la nature et la complexité des questions litigieuses, le désir des deux parties de poursuivre les discussions en vue d'en arriver à un règlement, et les délais obligatoires imposés par la Loi. Dans la présente cause, une possibilité raisonnable de régler le litige avait existé et aucun règlement n'était intervenu. Étant donné qu'aucun ordre n'avait été donné en vertu du paragraphe 24 (3), les deux exigences de l'alinéa 25 (1) a) étaient remplies et le Tribunal avait compétence pour entendre la plainte.

Après le dépôt de la requête mais avant l'audience, l'agente de révision a donné un ordre. Par conséquent, le Tribunal avait également compétence pour entendre l'affaire en vertu de l'alinéa 25 (1) b). Le requérant a eu le droit de modifier sa requête afin d'y inclure la demande d'audience présentée conformément au paragraphe 24 (6) et à l'alinéa 25 (1) b), les autres parties n'étant pas été lésées.

Avec l'accord du requérant et de l'intimé, le Tribunal a ordonné que la Commission régionale de police de Haldimand-Norfolk bénéficie du statut de partie en ce qui concerne la détermination des deux questions suivantes : l'envergure de l'établissement et la compétence du Tribunal

Statutes Referred To

Interpretation Act, R.S.O. 1980, c.219

Labour Relations Act, R.S.O. 1980, c.228

Pay Equity Act, 1987, S.O. 1987, c.34, ss.4, 5, 6, 7, 12, 13, 14, 22, 23, 24, 25

Statutory Powers Procedure Act, R.S.O. 1980, c.484

DECISION OF THE TRIBUNAL, APRIL 25, 1989:

1. This is an application by the Ontario Nurses Association that the Respondent, the Regional Municipality of Haldimand-Norfolk has acted contrary to the *Pay Equity Act, 1987* and in particular sections 4, 5, 6(1), 7, 12, 13 and 14 of the *Act*. The Haldimand-Norfolk Regional Board of Commissioners of Police is seeking status as a party. The Canadian Union of Public Employees filed a response; however the Tribunal noted its letter of April 19, 1989 that it had decided not to participate in the proceedings.

2. The Tribunal was in receipt of the application and responses on all the facts, issues and events in this case. A hearing was held on April 20, 1989 to hear argument on two preliminary matters; whether the Tribunal had jurisdiction to hear the complaint and who was a proper party in the matter before us. It was agreed that the Haldimand-Norfolk Regional Board of Commissioners of Police ("the Board of Commissioners") had status to make submissions on the question of jurisdiction and who is a proper party.

3. Both the Regional Municipality of Haldimand-Norfolk ("the Municipality") and the Board of Commissioners challenged the jurisdiction of the Tribunal to hear the complaint. There are essentially two questions of jurisdiction. First, does the Tribunal have jurisdiction to hear and decide the application under subsection 25(1) (a) of the *Act* as of the date of the application. Secondly, in light of the subsequent review officer's order of April 6, 1989, does the Tribunal have jurisdiction to hear and decide the complaint under subsections 24(6) and 25(1)(b) of the *Act*.

4. At the outset the panel heard submissions on the Respondent's right to have a court reporter. Counsel for the Respondent advised the Tribunal that he had retained the services of a court reporter for his own use, that the transcript would be the property of the Municipality, that it was an aid to Counsel and that the proceedings were open to the public. After submissions by the other parties, it was agreed that the hearing was public and that the transcript did not form part of the official record. Counsel for the Respondent gave an undertaking that he would make available to the parties any part of the transcript at any time in the proceedings at cost. The Tribunal noted that the transcripts do not form part of the official record and that the panel would be relying on its notes in its determination of the issues in this matter.

THE FACTS:

5. The following facts are not in dispute. The parties had been bargaining pay equity for some time. Documents filed with the Tribunal indicate an extensive history of negotiations for almost one year prior to the application to Review Services. On December 23, 1988, the Ontario Nurses Association ("ONA" or the "union") made application to Review Services under section 22, alleging that there has been a contravention of the *Pay Equity Act, 1987* (Exhibit 1). By letter dated December 28, 1988 the case manager of the Review Services Branch, Pay Equity Commission notified ONA that a review officer had been appointed. On January 9, 1989, ONA submitted to the review officer and to the Respondent a detailed statement of facts and issues in the complaint and

42 documents relating to the pay equity bargaining history between these parties. The covering letter (Exhibit 2) asked that the matters in dispute be determined as quickly as possible so that pay equity negotiations could be resumed to ensure parties could meet the January 1, 1990 posting deadline. These documents are virtually the same as those that now form the Applicant's filings before this panel with the exception of references to the Review Services process, the application to the Tribunal and the order that occurred subsequent to the application.

6. From December 28, 1988 to early March, 1989 meetings and discussions were held between the review officer and the parties. On March 9, 1989 ONA made an application requesting a hearing to the Pay Equity Hearings Tribunal that the "matter has not been settled by a review officer, nor has there been an order or decision". The Municipality and the Board of Commissioners both filed full responses on April 5, 1989. Both responses challenged the jurisdiction of the Tribunal to hear the complaint. On April 6, 1989 the review officer issued an order to the parties (Exhibit 4).

JURISDICTION:

7. The panel had the benefit of extensive and thoughtful submissions from counsel. The parties, sensitive to the issue of not arguing the substance of the review officer's settlement attempts, instead directed their submissions to the dispute resolution mechanism envisioned by the *Act*. It is natural that in the early interpretation of any new statute, submissions on the meaning of any provision will be fairly wide sweeping, as the parties have no case law upon which to base their arguments. We summarize here only the arguments most helpful to us in our deliberations; however, in coming to our decision we carefully considered and weighed all of the submissions made at the hearing.

8. Although a number of sections of the *Act* were referred to, the essential debate arose out of the meaning of section 25(1) of the *Pay Equity Act, 1987* which states:

> 25.-(1) The Hearings Tribunal shall hold a hearing,
>
> (a) if a review officer is unable to effect a settlement of a complaint and has not made an order under subsection 24(3);
>
> (b) if a request for a hearing, as described in subsection 23(4) or 24(6), is received by the Hearings Tribunal; or
>
> (c) if a review officer refers a matter to the Hearings Tribunal under subsection 24(5).

and subsection 24(6) of the *Act* with respect to the right of the Applicant to come to the Tribunal after an order is issued:

> 24.-(6) An employer or bargaining agent named in an order under this section may request a hearing before the Hearings Tribunal with respect to the order, and, where the order was made following a complaint but the complaint has not been settled, the complainant may also request a hearing.

THE APPLICANT'S ARGUMENT:

9. Counsel for the Applicant, Mary Cornish, submitted that there are three independent mechanisms for the Tribunal to take jurisdiction. First, she submitted that the Tribunal is mandated to hold a hearing under subsection 25(1)(a) where two preconditions have been met; that the review officer is unable to effect a settlement of a complaint and that an order has not been made under subsection 24(3). Counsel submitted that both prerequisites existed at the time of the March 9, 1989 application. She argued that the language of section 25(1)(a) is clear, and that unlike subsections 25(1)(b) or (c) there is no reference in 25(1)(a) that notification by a review officer of her inability to effect a settlement is a prerequisite to the holding of a hearing. She submitted that where the language of a statute is unambiguous, it is improper to imply a prerequisite that is not specifically stated.

10. Ms. Cornish submitted that to accept the proposition that review officers can absolutely control the dispute resolution process, would deny parties access to the full hearing process as set out in the *Act* and clearly such a limitation on the Tribunal's jurisdiction has not been expressly provided for or contemplated by the Legislature. She submitted that where the *Act* sets out strict time frames for achieving pay equity for the women of Ontario and specific enforcement mechanisms for achieving compliance, it is not consistent with the scheme, structure and purpose of the *Act* to permit Review Services to prevent a party from proceeding to the Tribunal level where necessary. Such an approach in the Applicant's case would jeopardize the parties' ability to comply with the time frame for posting the pay equity plan and to make the necessary pay adjustments by January 1, 1990, less than 9 months away.

11. Ms. Cornish also suggested that it was not appropriate to discuss the quality of settlement discussions but submitted that it was sufficient for the Applicant to show that a complaint was made, that a review officer had reasonable opportunity to effect a settlement and at that point they have a right to proceed to the Tribunal if the review officer has not made an order.

12. Counsel submitted that it was reasonable to require the review officer to exercise her duties to investigate the complaint within a reasonable time frame. She submitted that in this case the review officer's investigative role was simplified because of the extensive filings in the application and the extensive bargaining that had occurred prior to the application. She pointed out that although the Applicant had been willing to participate in settlement discussions, the complaint had been filed not seeking assistance in negotiations, but rather as a first level of enforcement of the Applicant's rights under the *Act*. The Applicant filed under section 22 of the *Act* alleging contraventions of the *Act*, asking Review Services to determine the matters in dispute and to grant relief. Counsel argued that two months had passed since the filing of the extensive documentation and the union was entitled to have the issues adjudicated in a reasonable time frame.

13. Counsel's second ground was that the Tribunal has clear jurisdiction as a result of the review officer's order issued on April 6, 1989. She asked the Tribunal to proceed on the basis of the Applicant's April 12, 1989 letter (Exhibit 3) to the Tribunal seeking to amend the application to request a hearing under an additional ground, under subsection 24(6) and subsection 25(1)(b) of

the *Act*. Counsel submitted that on the basis of the order, the Applicant has two independent rights to a hearing. Under subsection 24(6), ONA was a named bargaining agent in an order and therefore had the right to a hearing. Under the second part of subsection 24(6), an order was made following the complaint by ONA but the complaint has not been settled and the complainant is entitled to request a hearing. She also submitted that the order of April 6, 1989 is further reinforcement of the Section 25(1)(a) argument that the officer had been unable to effect a settlement.

14. Ms. Cornish spoke of the sometimes "inelegant construction" of the *Act*. In reply to the Respondent's argument that the order cannot be reviewed by the Tribunal, she suggested that it would be a ludicrous situation that a complaint could be dismissed at the review officer stage and there would be no right to a hearing at the Tribunal.

THE RESPONDENT'S ARGUMENT:

15. Counsel for the Respondent, Paul Wearing, agreed that the facts submitted by the Applicant on this question were not in dispute. He submitted that the application by ONA cannot be brought under any subsection of Section 25(1). He agreed with the Applicant that at the time of the March 9, 1989 application to the Tribunal the matter had not settled, nor was there a decision or order of the review officer. However, he argued that for 25(1)(a) to be met, it is the review officer who must determine that she has been unable to effect a settlement.

16. Counsel traced the duties and powers of the review officers under section 34 and other sections of the *Pay Equity Act, 1987* and, utilizing section 30 of the *Interpretation Act of Ontario*, R.S.O. 1980, c. 219, he distinguished between sections where the review officer "may" undertake an action, may being permissive and those duties described by the *Act* as "shall" which he submitted were to be construed as imperative. Counsel argued that the review officer has a discretionary entitlement by the *Act* to try and effect a settlement, but that it is not mandatory; and that it is for the review officer to decide that she could not effect settlement.

17. The second branch of Mr. Wearing's argument was that the order of April 6, 1989 was not subject to interpretation by the Tribunal. He suggested that the order does not specifically state that the officer was unable to effect a settlement and that the Tribunal cannot infer from the order the state of mind of the officer that she had decided she was unable to effect a settlement. He argued that there was no requirement by the review officer to decide all outstanding matters if she was unable to effect a settlement. He suggested that under section 23(2) that the review officer shall notify the Tribunal that a settlement cannot be effected and that since the order was silent on this, subsection 25(1)(a) could not be relied upon by the Applicant.

18. Respondent Counsel submitted that since there was no mandatory requirement on Review Services to effect a settlement, and since in the case before us the review officer dismissed the complaint instead of settling, the Applicant has no recourse to the Tribunal. He submitted that because of the discretion to settle or not, there is clearly no remedy under this statute when a

complaint is dismissed. He argued that the only exception was under subsection 23(3) where the review officer has found that the complaint is trivial, frivolous, vexatious or made in bad faith or that it is not within the jurisdiction of the Commission, and that none of those conditions form part of this case. He argued that only in those instances where the officer gives merit to a complaint, that the party losing has the right to a hearing of the Tribunal. Mr. Wearing argued that the union is estopped from raising complaints of disclosure and bad faith bargaining already adjudicated on by the review officer.

19. In response to submissions by the Applicant on the importance of the time frames and the need for expeditious consideration of matters, Counsel for the Municipality submitted that section 24(4) has given the review officer the authority to extend the mandatory posting dates.

20. Counsel also argued that the order of April 6, 1989 did not include a declaration as required by the wording of subsection 24(1) that the officer was of the opinion that a pay equity plan was not being prepared as required by Part II, and that since this precondition was not met, the review officer may have incorrectly exercised her authority.

21. Finally, Counsel argued against amendment of the application because the employer was entitled to know what case he had to meet. He did not however take issue with the applicant's submission that the issues and the filings remain identical, with the exception of the addition of the April 12, 1989 letter seeking to amend and seeking additional remedies.

THE BOARD OF COMMISSIONER'S ARGUMENT:

22. Counsel for the Board of Commissioners, David Ivey, made submissions on the question of jurisdiction, suggesting that at the time of the March 9, 1989 application to the Tribunal the review officer had not declared that she was unable to effect a settlement and thus the Tribunal had no jurisdiction under section 25(1)(a) of the *Act*.

23. With respect to the order issued on April 6, 1989 Mr. Ivey submitted that the role of the review officer differed from that of labour relations officers under the *Ontario Labour Relations Act*, in that although both officers investigate and attempt to effect a settlement, the pay equity officers have the power in some instances to issue orders. He adopted Mr. Wearing's argument that the Legislature did not give the right to appeal a dismissal of a complaint at the review officer stage. He suggested that the April 6, 1989 order was not so much to effect a settlement as to get the parties working again. He suggested that although the document was called an order, in a court it would have been a decision with the order attached and that we should consider the order that portion of the document directing the parties to bargain and therefore the Applicant cannot ask for a hearing under section 24(6) of the *Act*.

24. Counsel for the Board of Commissioners also supported Mr. Wearing's submission that the review officer might have exceeded her jurisdiction in issuing the order, because she had not met the precondition of section 24(1) that in her opinion a plan was not being prepared as required by Part II of the *Act*.

DECISION:

JURISDICTION UNDER SUBSECTION 25(1)(a):

25. In considering whether the Tribunal has jurisdiction to hear this application under section 25(1)(a), the Tribunal has carefully weighed the submissions made by counsel. Counsel for the Respondent Municipality drew our attention to the preamble of the *Pay Equity Act, 1987* and we find this a helpful place to begin. The preamble states: "whereas it is desirable that affirmative action be taken to redress gender discrimination in the compensation of employees employed in female job classes in Ontario ..." this *Act* is enacted. The *Act* places a positive obligation on employers and unions to bargain and implement pay equity. As Respondent Counsel pointed out, the thrust of the statute is to accomplish affirmative action to redress systemic wage discrimination; that it requires a negotiated process, and, where appropriate, mediation of disputes. He drew some analogy to the labour relations context set out in the *Ontario Labour Relations Act* and the spirit of promoting the negotiated settlement of pay equity plans.

26. We agree with these starting premises. The construction of the *Act* is to provide for and facilitate the negotiation of pay equity. Similar to the labour relations context, there is a dispute resolution mechanism which involves investigation of complaints, efforts at mediating a settlement, and if necessary a mechanism to hear the merits and enforce the basic tenants of the *Act*. There are also, however, several differences. The first is found in sections 4 and 5 of the *Pay Equity Act, 1987* which includes the purpose clause:

> 4.-(1) The purpose of this *Act* is to redress systemic gender discrimination in compensation for work performed by employees in female job classes.
>
> (2) Systemic gender discrimination in compensation shall be identified by undertaking comparisons between each female job class in an establishment and the male job classes in the establishment in terms of compensation and in terms of the value of the work performed.
>
> 5.-(1) For the purposes of this *Act*, the criterion to be applied in determining value of work shall be a composite of the skill, effort and responsibility normally required in the performance of the work and the conditions under which it is normally performed.

27. We start with this purposive framework in our analysis of the dispute resolution and enforcement mechanisms under the *Act*. The *Act* is a proactive statute, which requires employers and unions to take specific action to redress systemic wage discrimination and which sets the standards by which such actions will be measured. Unlike the normal labour relations context, there is a substantive interest in the content of the negotiations once parties seek to come to the Pay Equity Commission for enforcement of the *Act*. In addition, unlike the usual labour relations context, the *Pay Equity Act, 1987* sets out timetables by which plans must be negotiated and wage adjustments must begin. Although negotiations are the principle vehicle to determine pay equity plans in an unionized workplace, we have learned from the existing labour relations context that there will inevitably be disputes and that there is a need for their resolution in an effective complaint resolution mechanism. After settlement attempts have been unsuccessful, parties are entitled to have the merits of their complaint adjudicated expeditiously.

28. With respect to submissions by Counsel on mandatory time frames, we are not persuaded by Respondent Counsel's argument that the right under subsection 24(4) to extend the dates meant that the Legislature intended as a matter of course that the time limits set by the *Act* would be abridged by the parties or extended by Review Services. Counsel for the Respondent himself admitted the importance of working towards the timetables set out in the *Act*.

29. We concur with Respondent Counsel's submission that we should apply the plain words of the *Act* as per the *Interpretation Act of Ontario*, R.S.O. 1980, c.219. However, in applying those words, we cannot accept the argument that the determination of our jurisdiction in any way constrains the activities of the review officer. We accept that the words "shall" and "may" should be construed as imperative and discretionary respectively. In accepting that however, we are not persuaded that the interplay of these review officer duties under the *Act* in some way by-passes the right of parties to a full hearing on the merits of the case. The review officer is the first level of investigation and in some instances adjudication. However we note section 34(4) of the *Act* that the *Statutory Powers Procedures Act*, R.S.O. 1980, c.484, does not apply to a review officer. The Hearings Tribunal is the primary hearings mechanism under the *Pay Equity Act, 1987* and the only adjudicative mechanism falling under the *Statutory Powers Procedures Act*, R.S.O. 1980, c.484. It is the only adjudicative forum where a complainant has the right to lead evidence and make submissions in a full hearing, subject to the rules of natural justice.

30. The language of subsection 25(1)(a) is clear and unambiguous. The Tribunal is required to hold a hearing if a review officer is unable to effect a settlement of a complaint and has not made an order under subsection 24(3). Where the legislation required preconditions to the holding of a hearing, they are expressly stated in Section 25. An example of this is subsection 25(1)(c) which is dependent upon the review officer making a referral. No such prerequisite for the review officer to make a decision, notification or referral exists in subsection 25(1)(a) and it would be inappropriate to read such a requirement into the subsection. Instead we must look to the wording of the section and to the preconditions that are specified, namely that the review officer is unable to effect a settlement of a complaint and has not made an order under subsection 24(3).

31. In the case before us, it was agreed by all parties that as of March 9, 1989 no order had been made under subsection 24(3) and we need not consider that precondition any further. It was also agreed by all parties that a settlement did not exist at the time of the application. What is at issue however, is whether the review officer at that time was *unable* to effect a settlement.

32. We have listened to the submissions made by counsel regarding who decides that a review officer is unable to effect a settlement. There is no dispute that the Review Services is by the construction of the *Act*, the front line investigative and settlement mechanism of the Pay Equity Commission. Section 22 contemplates that any employer, employee or group of employees or their bargaining agent if any, may file a complaint with the Commission that there has been a

contravention of the *Act*, the regulations or an order of the Commission. Section 23 clearly envisions that a review officer shall investigate the complaint and may endeavour to effect a settlement. Counsel spent considerable time tracing the mandatory investigative and discretionary settlement duties of officers, as well as their adjudicative functions where they exist.

33. The role given to the review officer is a reflection of the existing labour relations framework in this province where settlement of disputes without resort to third party adjudication is clearly the preferable goal. The Legislature has recognized that parties must continue to foster healthy labour relations while at the same time meeting their obligations under the *Pay Equity Act*. Where parties in a collective bargaining relationship cannot agree, the review officer's investigative and mediative skills are utilized to attempt a resolution. The review officer differs from other labour relations officers in that in some parts of the *Act* she also performs a first level adjudicative function which requires the determination of the merits of a dispute.

34. Turning to the wording of subsection 25(1)(a), once a party has utilized the dispute resolution process as envisioned by sections 22 and 23, do they have the right to ask the Tribunal to hear the case? The wording of subsection 25(1)(a) requires the Tribunal to decide if two preconditions have been met. If they are met, there is an obligation to hold a hearing. Given this mandatory obligation, in the context of a request for a hearing under section 25 (1)(a), we find that it is the Tribunal that must decide if a review officer is unable to effect a settlement of a complaint and has not made an order under subsection 24(3).

35. Having said that, we are sensitive to the vital role that review officers play in the process and we do not wish to undermine that role in any way in the determination of our jurisdiction to hear a case. In determining whether an officer has been unable to effect a settlement, we do not intend to enter into an analysis of the effectiveness of the Review Services process, nor into any investigation of the merits of this case or substance of settlement attempts. It is not appropriate in the context of this matter for the Tribunal to be monitoring or evaluating settlement proposals.

36. In our view, we see the threshold question as "has there been a reasonable opportunity for a settlement to be effected?". If the answer is no, then parties clearly need to continue in the review services process. If "yes", then we as a Tribunal could find that an officer has been unable to effect a settlement and that the parties have a right to a hearing on the complaint.

37. In assessing what is a reasonable opportunity, several factors must be considered. The factors, although not an exhaustive list, include: the nature and extent of pay equity bargaining prior to the application to review services; the length of time the parties were at review services; the nature and complexity of the issues in dispute; the willingness of both parties to continue discussions where a settlement seems possible; and the time remaining until the mandatory time frames required by the *Act*. If after assessing these factors, the Tribunal decides that parties had a reasonable opportunity to settle with the assistance of a review officer, the Tribunal could find that an officer had been unable to effect a settlement. Assuming the other precondition under subsection 25(1)(a)

had been met, it would then be required to hold a hearing. Such an approach appears to balance the rights of parties to a fair and expeditious resolution of their complaint, while recognizing the need for Review Services to have the opportunity to investigate and endeavour to effect a settlement.

38. Turning to the facts of this case, can the Tribunal find that the review officer was unable to effect a settlement at the time of the March 9, 1989 application to the Tribunal? Applying our threshold question of whether the review officer had a reasonable opportunity to settle the complaint, we note that the parties had been bargaining pay equity for about one year prior to the complaint to Review Services. There has been an extensive history of bargaining prior to the complaint. However, we also note that the issues are numerous and somewhat complex. It is clear that the Applicant filed the application at Review Services with a view to having the issues determined as expeditiously as possible. It was undisputed that the review officer had the benefit in early January of having comprehensive documentation on the issues in dispute and the history of pay equity bargaining between these parties. Meetings and discussions occurred for more than two months. The parties did not express a willingness to continue discussions with a view that a settlement was forthcoming. In looking at the fifth factor, we note that at the time of application, the parties were 9 months away from their mandatory posting date.

39. We were cognizant of the need in a first adjudicative look at these sections of the law not to unnecessarily establish broad sweeping tests or to set time lines that are unduly hard or overly technical. It is not our intention to set rigid time frames by which to judge whether the review officer is unable to effect a settlement. Rather, the passage of time at Review Services in any one case must be weighed as one of several factors. The Tribunal, although not relying on the April 6, 1989 order, did note its existence as indication that at least at a point shortly after the application the review officer had been unable to effect a settlement. Having weighed all of the factors, the nature and extent of bargaining, the nature of the application and the complexity of the issues, the time spent at Review Services, the willingness to continue discussions where settlement seems possible, and the mandatory time frames; on balance we find that a reasonable opportunity did exist to settle the application and we find that the review officer was unable to effect a settlement. Given that there is no dispute that the second precondition of subsection 25(1)(a) had been met, namely that there was no order under subsection 24(3), the Tribunal finds that it has jurisdiction to hear this application under section 25(1)(a) of the *Act*.

JURISDICTION UNDER SUBSECTION 25(1)(b):

40. We now consider the question of jurisdiction arising out of the order issued by the review officer on April 6, 1989. Under subsection 25(1)(b) the Tribunal is required to hold a hearing if a request for hearing as described by subsection 24(6) is received by the Tribunal. Subsection 24(6) clearly entitles a party named in an order the right to request a hearing. In this case, there is no dispute that the order was issued. We are not persuaded by arguments of counsel that the order is only that part of the document that directs the parties to resume bargaining. To interpret the order that way would be to ignore the fact that on its face, the entire document is titled "Pay Equity

Commission Review Services Order in the matter of the *Pay Equity Act, 1987* and the Ontario Nurses Association, Applicant and the Regional Municipality of Haldimand-Norfolk, Respondent". With respect to counsel's argument that the review officer may have incorrectly exercised her authority, we find that it is not necessary at this point to decide this; for purposes of the jurisdictional question we need only consider whether an order existed, and whether as a result of that order, the Applicant was entitled to request a hearing.

41. The Tribunal finds that as of April 6, 1989 an order existed and that the Applicant has the right to request a hearing before the Hearings Tribunal on two separate grounds under subsection 24(6) of the *Act*. The ONA as a bargaining agent named in the order is entitled to request a hearing. Secondly, under the second part of subsection 24(6) the order was made following a complaint by ONA, the complaint was not settled and the complainant may request a hearing.

42. Counsel for the Applicant sought to amend its original application to request a hearing on the additional grounds pursuant to subsections 24(6) and 25(1)(b). After carefully considering submissions on whether or not the application should be amended, on balance we believe that it is only common sense to allow the amendment. The Applicant relies on all its original filings in support of the amended application as well as the letter of April 12, 1989 seeking to amend. To require the Applicant to withdraw and refile and serve all parties the same materials again is not practical. The parties themselves have indicated that they wish to avoid additional cost and delay. There is no prejudice to the other parties given that they have already fully responded to the application and will be given an opportunity for further response arising out of the order.

43. We therefore direct that the application be amended to add the Applicant's request for a hearing pursuant to subsections 24(6) and 25(1)(b) of the *Pay Equity Act, 1987* and to include the April 12, 1989 letter to the Tribunal as part of the application including amending the relief sought. We also direct that the other parties in this proceeding shall within seven calendar days of the date of this decision, file any further response they may wish arising out of the amendments to the application, and we direct the parties to serve the other parties as set out in the Tribunal's Rules of Practice.

PARTIES TO THE PROCEEDING:

44. The Tribunal received submissions on whether the Haldimand-Norfolk Regional Board of Commissioners of Police should have status as a party to these proceedings. All parties agreed that the Board of Commissioners had status for purposes of the jurisdictional argument.

45. Counsel for the Board of Commissioners submitted that it should have status in the question of what is the establishment. He submitted that if the Board is found to be part of the establishment for pay equity purposes, then members of the police force could be suggested as comparators by the applicant union. He requested that he reserve his right to participate in the rest of the proceedings. When asked what his interest in the rest of the proceedings was, he suggested that although he may not have an interest in the good faith bargaining dispute, he might have an interest in such issues as the gender neutral system of comparison.

46. Counsel for the Board of Commissioners suggested that the question of what is the establishment is a distinct issue and he requested that the hearing be bifurcated into two parts; first that the Tribunal hear evidence and argument on the question of what is the establishment and then on the rest of the merits of the application. He submitted that if the Board of Commissioners is found not to be part of the establishment, its interest ends there and the Board should not be forced to bear the costs of a lengthy hearing on the entire case. He did argue, however, that if the Tribunal decided not to hear the question of what is the establishment first, thus necessitating his attendance to all of the proceedings, that he should have full rights to party status.

47. Counsel for the applicant union did not object to the right of the Board of Commissioners to have party status for the purpose of determining what is the establishment. She argued however that there were many issues in the application and that the Board of Commissioners did not have an interest in the case beyond the question of what is the establishment. She submitted that if the Board of Commissioners is successful and is found to be a separate establishment, it has no status in the remaining proceedings; and if it is unsuccessful, then it would form part of the Respondent.

48. Ms. Cornish also argued that the question of what is the establishment could not be separated from all of the issues in the case, and to hear that question first would cause duplication of witnesses and evidence. She expressed concern that the Respondent would have the opportunity to cross examine her witnesses twice. She also submitted that there was a need to have these issues decided quickly, and that to hear and decide the question of establishment first would cause unnecessary delay.

49. Counsel for the Municipality submitted that it was premature to decide who the parties were. He expressed concern about the difficulty of separating the issue of establishment and suggested that the Board of Commissioners be given status for the entire proceeding.

50. There was no dispute between the parties that the Board of Commissioners is entitled to party status in determining what is the establishment. By Counsel for the Board of Commissioners own submission, if it is not part of the establishment, the Board's interest ends there. On balance however, we are not persuaded that if the Board of Commissioners is found to be part of the establishment, it has in this application, an interest as a party separate from that of the Respondent Municipality.

51. We are persuaded by Mr. Ivey's submission that we proceed first on the question of establishment. Determining this question first will give direction to the parties. Given the Board of Commissioner's limited interest in these proceedings, it should not be unnecessarily costly for the Board. It makes good sense to proceed first on the issue of establishment. We are not persuaded by the delay argument made by Counsel. The Tribunal is committed to an expeditious hearing and decision making process. Just as we commented on the need to keep the process of pay equity negotiations and dispute resolution moving in a fair and expeditious way, so too is the Tribunal committed to hearing and deciding issues in a manner that will best allow the parties to meet their obligations to negotiate and implement a pay equity plan.

52. We are also not persuaded by the argument that there will be a duplication of evidence. The issue of what is the establishment is a discreet issue, and evidence can be lead and cross examined on that issue with the understanding that other issues in dispute will be dealt with in evidence and argument after the issue of establishment is disposed of.

53. The style of cause is therefore amended to include the Haldimand-Norfolk Regional Board of Commissioners of Police as a party for the purposes of determining jurisdiction of the Tribunal in this matter and for purposes of determining what is the establishment. We direct the parties to lead evidence and argument on what is the establishment. We also direct the Applicant and the Respondent to lead evidence and argument on the remaining issues in this application immediately thereafter.

54. At the end of the day, Counsel for the Applicant raised additional matters preliminary to the merits of the case. It was agreed by the parties that they would talk in advance of the next day of hearing and that if necessary we would hear submissions on these preliminary matters at that time. The Registrar is hereby directed to set additional days of hearing as soon as possible. This hearing will resume on May 3, 5, 8 and 15, 1989 and continue on such dates as set by the Registrar.

0001-89 Ontario Nurses Association, Applicant v. Regional Municipality of **Haldimand-Norfolk,** Respondent; Haldimand-Norfolk Regional Board of Commissioners of Police, Other Party (No. 2)

Before: Janis Sarra, Vice-Chair and Members Sharon Laing and Geri Sheedy

Appearances: Mary Cornish, Felicity Briggs, Noelle Andrews, Lawrence Walter and Anne Marie Delorey for the Applicant, Ontario Nurses Association; Paul Wearing and Bill McDougall for the Respondent, Regional Municipality of Haldimand-Norfolk; W. Graydon Sheppard and Stan Floras for the Haldimand-Norfolk Regional Board of Commissioners of Police.

Practice and Procedure - Review Services Order - Application to Stay PEHT - Hearing - Jurisdiction

The applicant sought to stay the review services order on the grounds that it revealed a prima facie error. Stays of review officer orders are not provided for in the Act.

The Tribunal dismissed the application to stay.

The enforcement of orders comes before the Tribunal pursuant to ss. 24(5) and 25(1)(c), by way of referral of the Review Officer. No attempt to enforce the order had been made. The issues before the Tribunal are the very issues that were in dispute at Review Services. The Applicant has requested a hearing before the Tribunal and the Tribunal will take a fresh look at the issues.

Practice and Procedure - Pleadings - Application to Strike

The applicant sought to strike out certain portions of the Response on grounds that it contained fresh allegations against the applicant that were not brought at the review services stage.

The Tribunal struck portions of the Response.

Portions of the Response on their face make counter allegations and therefore must be struck. A defence is not to include charges that the Act has been contravened when such allegations were not part of the complaint resolution process at Review Services. It is appropriate for the Respondent to seek a remedy which was sought at the Review Services stage or where the request for remedy arises out of a review officer's order.

Pratique et procédure - Ordre des Services de révision - Requête en suspension T.É.S. - Audience - Compétence

Le requérant a tenté d'obtenir une suspension de l'ordre des Services de révision en faisant valoir qu'il contenait une erreur prima facie. La Loi ne prévoit pas la suspension des ordres des agents de révision.

Le Tribunal a rejeté la requête en suspension.

L'agent de révision peut, conformément au paragraphe 24 (5) et à l'alinéa 25 (1) c), renvoyer la question de l'exécution de ses ordres au Tribunal. Aucune tentative d'exécution de l'ordre n'a eu lieu. Les questions renvoyées au Tribunal sont les questions litigieuses dont avaient été saisis les Services de révision. Le requérant a demandé qu'une audience ait lieu devant le Tribunal et celui-ci jettera un regard neuf sur les questions.

Pratique et procédure – Actes de procédure – Demande de rayer des parties de la défense

Le requérant voulait faire rayer certaines parties de la défense pour le motif qu'elle comprenait de nouvelles allégations contre lui qui n'avaient pas été mentionnées à l'étape de la révision.

Le Tribunal a rayé des parties de la défense.

Au vu de la défense, certaines parties comprennent des contre- allégations et doivent, par conséquent, être rayées. Une défense ne doit pas comprendre des accusations portant que la Loi a été enfreinte lorsque ces allégations ne font pas partie du processus de résolution de la plainte lors de la révision. Il est approprié que l'intimé cherche à obtenir un recours qui a été demandé lors de la révision ou si la demande de recours résulte d'un ordre de l'agent de révision.

Statutes Referred To

Pay Equity Act, 1987, S.O. 1987, c.34, ss. 4, 5. 6, 7, 12, 13, 14, 22, 23, 24, 25

Statutory Powers Procedure Act, R.S.O. 1980, c.484

Statutory Powers Procedure Act, R.S.O. 1980, c.484, s.19.

Rules Referred To

Pay Equity Hearings Tribunal, *Rules of Practice*,Rule 2.03

Authorities Referred To

Muldoon, Paul R., *Law of Intervention: Status and Practice* (Aurora, Ont.: Canada Law Book, 1989).

DECISION OF THE TRIBUNAL, MAY 11, 1989:

1. This is an application by the Ontario Nurses Association (ONA) that the Respondent, the Regional Municipality of Haldimand–Norfolk (Regional Municipality) has acted contrary to the *Pay Equity Act, 1987* and in particular sections 4, 5, 6(1), 7, 12, 13 and 14 of the *Act*. On May 3, 1989 the Tribunal heard submissions on several preliminary motions and gave oral rulings. These additional preliminary motions are matters in which the parties are seeking direction from the Tribunal in the context of no prior statutory interpretation.

MOTION TO STAY THE REVIEW SERVICES ORDER:

2. Counsel for the Applicant, Ms. Cornish requested that the Tribunal exercise its discretion under section 25(2)(g) of the *Pay Equity Act, 1987* and stay the decision of the review officer dated April 6, 1989. She asked the Tribunal to decide that there was a *prima facie* error with respect to the order and based upon that test, the order should be stayed. Counsel for the Respondent, Mr. Wearing submitted that the *Act* makes no specific reference to staying an order of a review officer. He submitted that to stay the order on the basis of prima facie error given that the Tribunal was not yet in receipt of evidence, would be to prejudge and thus fetter our jurisdiction to deal with the matters now before us.

3. The Tribunal has carefully considered all of the submissions of Counsel and we dismiss the Applicant's motion. This application came to Review Services under section 22 of the *Pay Equity Act, 1987*. A review officer investigated under section 23 and eventually issued an order under section 24. The ONA applied to the Tribunal which took jurisdiction to hear this case in its decision dated April 25, 1989. The issues in dispute at the Review Services stage are precisely the issues now before the Tribunal. The only information from Review Services is the order. In this proceeding

witnesses will be called and the Tribunal will hear the evidence for the first time. In hearing the merits, the Tribunal will take a fresh look at the issues and provide the parties with the first opportunity to adduce evidence and to make submissions on the matters in dispute at a full hearing subject to the *Statutory Powers Procedures Act*, R.S.O. 1980 c.484.

4. There is no specific language in the *Pay Equity Act, 1987* with respect to a stay. The statute contemplates however, that any effort to enforce the review officer's April 6, 1989 order would come to the Tribunal. The *Statutory Powers Procedures Act*, R.S.O. 1980 c.484 does not apply to a review officer. A party seeking to enforce this order would come before the Tribunal through Review Services by way of referral under subsections 24(5) and 25(1)(c) of the *Pay Equity Act, 1987* which specify:

> 24.-(5) Where an employer or a bargaining agent fails to comply with an order under this section, a review officer may refer the matter to the Hearings Tribunal.
>
> 25.-(1) The Hearings Tribunal shall hold a hearing,
>
> . . .
>
> (c) if a review officer refers a matter to the Hearings Tribunal under subsection 24(5).

The Tribunal is then required to hold a hearing to consider whether a party has failed to comply with an order of the review officer. If the Tribunal determines failure to comply, the decision of the Hearings Tribunal is enforceable by filing with the Supreme Court of Ontario pursuant to section 19 of the *Statutory Powers Procedures Act* R.S.O. 1980 c.484.

5. Counsel for the Applicant agreed that in this case, the Tribunal did not have before it any complaint that the applicant union had not complied with the order. She submitted that ONA was seeking a stay to ensure that it would not be in contravention of the order should the Respondent seek to enforce. No such referral from the review officer that the order has not been complied with, or request to enforce is before us. Clearly the Tribunal will decide only the issues before it. Any application to enforce an officer's order would be scheduled for a hearing either separately or on a consolidated basis with this application based upon the Tribunal's right to control its own practice and procedure and upon the need to dispose of issues in a fair and expeditious manner. It is natural that as matters arising from a new statute are litigated for the first time that parties will seek direction. However, such direction will not extend to the stay of an order when there is no attempt to enforce the order and when the issues that the Tribunal will consider are the very issues which were in dispute at Review Services. The motion to stay the order is therefore dismissed.

MOTION ON INDEPENDENT RELIEF

6. Counsel for the Applicant made a preliminary motion requesting that the Respondent Regional Municipality's remedial request for "an order to the Applicant Union to bargain in good faith toward the achievement of a gender-neutral comparison system and pay equity plan with the employer; and such further and other relief as the Respondent Employer may advise and the Commission may see fit to grant" and paragraph 14 of the Response "The employer further states

that the applicant union has failed to negotiate in good faith for a gender neutral comparison system" be struck from the Respondent's Response on the grounds that the Regional Municipality did not file a complaint with Review Services in this matter and accordingly is not now entitled to seek independent relief.

7. Counsel submitted that it is not proper at this stage for the employer to declare or state a complaint. She submitted that the *Pay Equity Act, 1987* has a specific complaint mechanism, which includes filing a complaint, an investigation by a review officer with an attempt to settle the issues in dispute. She submitted that in this case, the allegation was not made at the Review Services stage, it has not been investigated by the officer, and there has been no opportunity to settle or have early resolution of this matter. Ms. Cornish submitted that the Applicant has no knowledge of the basis of the statement and no particulars of the allegations. Counsel submitted that the Respondent could have filed its own complaint then or at any time since, and that the Respondent cannot abridge all the steps at Review Services and now seek independent relief.

8. Counsel for the Respondent submitted that the employer is not filing a counter complaint. He submitted that the Tribunal's Rules of Practice and Response form make reference to remedy; that the Regional Municipality was only following the direction of the form and rule 2.03(d) of the Rules of Practice which asks for remedy sought. Counsel also requested during his submission that the Tribunal amend the Response to request that the Tribunal confirm the review officer's order under section 25(2)(d) of the *Act*. Mr. Wearing submitted that in asking the Applicant to bargain in good faith, the Respondent was asking the Tribunal to direct the applicant to bargain as per the order. He did not dispute however, that at the time of this remedial request, the order did not yet exist. Counsel submitted that paragraph 14 is brought to assert the Respondent's own defence and to strike it would be to constrain the employer's defence.

9. Having weighed the arguments of Counsel, on balance we find that paragraph 14 does on its face make a counter allegation and must therefore be struck. The wording of the paragraph states that "the applicant union has failed to negotiate in good faith for a gender neutral comparison system ..." which is precisely the wording that would charge a contravention of section 14 of the *Pay Equity Act, 1987*. There is no dispute by the parties that these counter allegations were not at the review officer stage. Although we are sympathetic to the Respondent's submission that the paragraph was meant only as a defence, we cannot accept that a defence is to include charges that the *Act* has been contravened when such allegations were not part of the complaint resolution process at Review Services. The Respondent is entitled to bring a full defence with respect to the allegations made by the Applicant union and we fully expect to hear evidence and argument arising out of the detailed Response filed.

10. With respect to Mr. Wearing's submission on the independent relief sought, we understand that on its face the form solicits a request for remedy. The Respondent is commended for attempting to meet all the requirements of the rules and forms. However, the rules and forms do not make clear that such remedy must also be requested in the context of the complaint mechanisms

in the *Act*. If a Respondent has sought relief at the Review Services stage, then it is appropriate to seek that remedy when the Tribunal considers the merits of a case. Similarly, if a request for remedy arises directly out of a review officer's order, it will be appropriate to seek that remedy at the Tribunal. Accordingly, we strike paragraph 2 of the remedy section of the Response by the Regional Municipality.

11. We do however find that it is appropriate for the Respondent to seek to confirm the officer's order and ask the Tribunal to direct the applicant to bargain as per the order. Accordingly, we amend the remedy section of the Response to include the Respondent's request to confirm the order of the review officer dated April 6, 1989.

ISSUES BEFORE THE TRIBUNAL

12. Counsel sought clarification of what matters are now before the Tribunal arising out of its decision of April 25, 1989 to take jurisdiction to hear the case under subsections 25(1)(a) and 25(1)(b) of the *Act*. The Tribunal will proceed to hear the evidence and argument on the allegations contained in the March 9, 1989 application to the Tribunal that the Respondent has contravened sections 4, 5, 6(1), 7, 12, 13 and 14 of the *Pay Equity Act, 1987* and the Responses filed. The Tribunal also will consider the remedy sought by the Applicant in its March 9, 1989 application, the amended remedy sought in its letter of April 12, 1989 as well as the amended relief sought by the Respondent to confirm the order of the review officer dated April 6, 1989. This hearing will resume on May 15, 1989.

0001-89 Ontario Nurses Association, Applicant v. Regional Municipality of **Haldimand-Norfolk**, Respondent; Haldimand-Norfolk Regional Board of Commissioners of Police, Other Party **(No. 3)**

Before: Janis Sarra, Vice-chair and Members Geri Sheedy and Sharon Laing

Appearances: Mary Cornish, Felicity Briggs, Noelle Andrews and Anne Marie Delorey for the Applicant, Ontario Nurses Association;Paul Wearing and Bill McDougall for the Respondent, Regional Municipality of Haldimand-Norfolk; W. Graydon Sheppard, Stan Floras and Mayor Orval Shortt for the Haldimand-Norfolk Regional Board of Commissioners of Police.

Interpretation - Purpose of Act - Discrimination
Interpretation - Purpose of Act - Labour Relations
Application of Act - Employer
Application of Act - Establishment

The issue before the Tribunal was whether the Regional Municipality of Haldimand-Norfolk ("the Municipality") is the employer of the Haldimand-Norfolk Regional Police such that the police are part of the Municipality's establishment.

The Tribunal held that the police are part of the Regional Municipality's establishment.

The Act is a statute having the specific purpose of redressing systemic wage discrimination. It has both human rights and labour relations elements. As the Act does not define "employer", the test adopted by the Tribunal must utilize criteria that best accord with the objectives, structure and scheme of the Act. The Tribunal finds that a flexible approach as adopted by the Ontario Labour Relations Board is useful particularly in the early interpretation of a new statute. No one indicium will be determinative; each must be considered and assessed on the facts of each case. The factors to be examined, while not all encompassing, include: who has overall financial responsibility; who has

responsibility for compensation practices; what is the nature of the business, service or enterprise; and what is most consistent with achieving the purpose of the Act.

In applying these criteria, the Tribunal found on balance that the Regional Municipality was the employer of the police. Therefore, pursuant to the definition of establishment in ss. 1(1), the police are part of the Regional Municipality's establishment.

Dissent of Tribunal Member Sharon Laing

There is insufficient evidence to justify the majority decision in the application of the first three criteria. Furthermore, the Applicant did not establish that the purposes of the Act could not be achieved with the police excluded from the establishment of the Regional Municipality

Interprétation – Objet de la Loi – Discrimination
Interprétation – Objet de la Loi – Relations de travail
Champ d'application de la Loi – Employeur
Champ d'application de la Loi – Établissement

Le Tribunal devait décider si la municipalité régionale de Haldimand-Norfolk («la municipalité») était l'employeur de la police régionale de Haldimand-Norfolk afin de déterminer si la police fait partie de l'établissement que constitue la municipalité régionale.

Le Tribunal a décidé que la police faisait effectivement partie de l'établissement que constitue la municipalité régionale.

L'objet particulier de la Loi est d'éliminer la discrimination systémique entre les sexes en ce qui concerne la rétribution du travail. La Loi comprend des dispositions ayant trait à la fois aux droits de la personne et aux relations de travail. Étant donné que la Loi ne définit pas le terme «employeur», le test que devrait adopter le Tribunal devrait être fondé sur les critères qui concordent le mieux avec l'objet, la structure et le plan de la Loi. Le Tribunal estime que l'approche souple qu'a adoptée la Commission des relations de travail de l'Ontario est tout particulièrement utile en ce qui concerne l'interprétation initiale d'une nouvelle loi. Aucun indice ne sera déterminant; chacun devra être étudié et évalué en fonction des faits de chaque cas. Les facteurs qui doivent être étudiés, même s'ils ne sont pas globaux, comprennent notamment : qui assume la charge de l'ensemble de la responsabilité financière; qui est responsable des pratiques en matière de rétribution; quelle est la nature de l'entreprise ou du service; et quelle est la mesure la plus compatible avec la réalisation de l'objet de la Loi. Lorsqu'il a appliqué ces critères, le Tribunal a conclu, tout compte fait, que la municipalité régionale était l'employeur de la police. Par conséquent, conformément à la définition du terme «établissement» au paragraphe 1 (1) de la Loi, la police fait partie de l'établissement que constitue la municipalité régionale.

Dissentiment de Sharon Laing, membre du Tribunal

Il n'existe pas suffisamment de preuves pour justifier la décision majoritaire en ce qui concerne l'application des trois premiers critères. En outre, le requérant n'a pas prouvé que l'objet de la Loi ne pouvait pas être atteint en excluant la police de l'établissement que constitue la municipalité régionale.

Cases Referred to

Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 295; 36 C.R.R. 193

Canadian National Railway Company v. Canadian Human Rights Commisssion, 87 C.L.L.C. 17,022 (S.C.C.)

Cormier v. Alberta Human Rights Commission (1984), 85 C.L.L.C. 17,003 (Alta. Q.B.)

Heerspink v. Insurance Corporation of British Columbia, 82 C.L.L.C. 17,014 (S.C.C.)

Kennedy Lodge Inc., [1984] O.L.R.B. Rep. July 931

Myers v. Hoffman, [1956] 1 D.L.R. (2d) 272 (H.C.J.)

National Union of Public Employees and Municipality of Metropolitan Toronto (1961), 2 C.L.L.C. 16,214 (O.L.R.B.)

Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police, [1979] 1 S.C.R. 311

Ontario Human Rights Commission and O'Malley v. Simpson-Sears (1986), 7 C.H.R.R. D/3102 (S.C.C.)

Pereira, R. v. (1988), 20 C.C.E.L. 187 (Alta. Q.B.)

Province of Ontario Board of Internal Economy, [1980] O.L.R.B. Rep. Jan. 88

Ralston Purina Canada Inc., [1979] O.L.R.B. Rep. June 552

Reference Under the Constitutional Questions Act, [1957] O.R. 28 (C.A.)

Robichaud v. Canada (Treasury Board) (1987), 8 C.H.R.R. D/4326 (S.C.C.)

St. Catherine's Police Association and the Board of Police Commissioners for the City of St. Catherines, Re, [1971] 1 O.R. 430 (H.C.J.)

Sutton Place Hotel, [1980] O.L.R.B. Rep. Oct. 1538

Telegram Publishing Company Ltd. and Amm (1973), 3 L.A.C. (2d) 175

Waterloo County Roman Catholic Separate School Board, [1977] O.L.R.B. Rep. Dec. 856

York Condominium Corporation, [1977] O.L.R.B. Rep. Oct. 645

Statutes Referred To

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B of the Canada Act 1982 (U.K.), 1982, c.11

Interpretation Act, R.S.O. 1980, c.219.

Labour Relations Act, R.S.O. 1980, c.228.

Pay Equity Act, 1987, S.O. 1987, c.34, ss.1, 4, 5, 6, 7, 12, 13, 14.

Police Act, R.S.O. 1980, c.381, ss. 14, 24, 28, 32, 35, 36, 37, 39, 58.

Regional Municipality of Haldimand-Norfolk Amendment Act, S.O. 1973, c.155.

Regional Municipality of Haldimand-Norfolk Act, R.S.O. 1980, c.435.

Regional Municipality of Haldimand-Norfolk Act, S.O. 1973, c.96.

Authorities Referred To

Canada, *Report of the Royal Commission on Equality in Employment*, Vol.1 (Ottawa: Canadian Government Publishing Centre, 1984) (Commissioner: Judge Rosalie Silberman Abella).

Ontario, Minister Responsible for Women's Issues, *Green Paper on Pay Equity* (Toronto: The Minister, 1985),

Rogers, I.M., *The Law of Canadian Municipal Corporations*, 2d ed. (Toronto: Carswell, 1971).

DECISION OF J. SARRA, VICE CHAIR, AND TRIBUNAL MEMBER G. SHEEDY, JUNE 30, 1989:

1. This is an application by the Ontario Nurses Association that the Respondent, the Regional Municipality of Haldimand-Norfolk, has acted contrary to the *Pay Equity Act, 1987* and in particular Sections 4, 5, 6(1), 7, 12, 13 and 14 of the *Act*. In its decision of April 25, 1989 the Tribunal directed the parties to lead evidence and argument first on the question of what is the establishment and ruled that the Haldimand-Norfolk Regional Board of Commissioners of Police is a party for purposes of determining this question. The Tribunal held a hearing on May 5, 8, 15 and June 12, 13 and 14. The parties requested that the Tribunal decide the question of employer and establishment as expeditiously as possible to assist the parties in this process. In deciding the issue of what is the establishment and who is the employer for pay equity purposes, we make no comment in general on what stage in the pay equity negotiation process parties should seek adjudication on these issues; that larger policy question was not before us and we need not address it in this case. In making the findings of fact set forth in this decision, the Tribunal has carefully considered all the oral evidence of eleven witnesses and the documentary evidence of more than 60 documents submitted as exhibits. We have considered such factors as the firmness and consistency of the witnesses' evidence, their ability to resist the influence of self-interest, and their demeanor. In reaching our conclusions we have carefully considered all of the submissions of Counsel on both the evidence and the authorities placed before the Tribunal.

2. The issue before the Tribunal was whether or not the Haldimand-Norfolk regional police force should be included in the establishment of the Regional Municipality of Haldimand-Norfolk for purposes of pay equity. The definition of establishment is contained in Subsection 1(1) of the *Pay Equity Act, 1987*:

> 1(1)In this *Act*...
>
> > "establishment" means all of the employees of an employer employed in a geographic division or in such geographic divisions as are agreed upon under section 14 or decided upon under section 15.

By the definition of establishment, the Tribunal must determine who is the employer for purposes of the *Act*. There was no dispute that the Regional Municipality is the employer of the nurses. In this case the police can only be part of the establishment if the employer of the police for purposes of pay equity is found to be the Regional Municipality. The parties agreed that the issue of who is the employer and what is the establishment, is a dispute relating to definition and does not form part of the Applicant's bad faith bargaining allegations.

3. The Tribunal received the evidence of Ms. Noelle Andrews, Assistant Director of Government Relations for the Ontario Nurses Association; Ms. Diane Peart a public health nurse employed by the Haldimand-Norfolk Regional Health Unit; Ms. Rhondi Brown, Employment Relations Officer for ONA responsible for the Regional Municipality of Haldimand-Norfolk; Ms. Karen Boughner, a public health nurse with the Regional Municipality of Haldimand-Norfolk; Mr. Orval Shortt, Mayor of Nanticoke, Member of the Regional Council of Haldimand-Norfolk and Chair of the Haldimand-Norfolk Board of Commissioners of Police; Chief Lee Richard Stewart, Chief of Police for Haldimand-Norfolk; Mr. Dennis Leigh, a police constable with the Haldimand-Norfolk regional police force; Ms. Patricia Hosack, Manager of Finance for the Haldimand-Norfolk Board of Commissioners of Police; Mr. Robert Johnstone, Treasurer and Commissioner of Finance for the Regional Municipality of Haldimand-Norfolk; Mr. Lorne Perron, Director of Labour Relations for the Metropolitan Toronto Police Force; and Mr. Jeffrey Cann, Director of Personnel Services for the Regional Municipality of Haldimand-Norfolk.

THE FACTS:

4. The Ontario Nurses Association ("ONA") is the collective bargaining agent for the full time Registered and Public Health Nurses employed in the Regional Health Unit, and for part time Registered Nurses at Grandview Lodge. The Regional Municipality of Haldimand-Norfolk ("Regional Municipality") and ONA are the signators to the two collective agreements.

5. The Regional Municipality was created by the *Regional Municipality of Haldimand-Norfolk Act*, given assent in October 1973 and coming into force April 1, 1974. The Haldimand-Norfolk Board of Commissioners of Police ("Board of Commissioners" or "Board") was created by legislation amending that *Act*, receiving assent in December 1973 and coming into force January 15, 1974 in anticipation of the regionalization of the government. Prior to that, each area municipality delivered police services directly. The purpose of amalgamating the area municipalities including the police force, was to ensure more efficient service over a larger area of the region and was part of a province wide move to a system of regional government.

6. Within the Regional Municipality of Haldimand-Norfolk, there is also the lower tier of municipal government which includes six area municipalities; the City of Nanticoke, the Town of Simcoe, the Town of Haldimand, the Town of Dunville, the Township of Delhi and the Town of Norfolk each with their own council and staff. The Regional Municipality is governed by the Regional Council with 19 members elected to Council and a Chair elected from among those members. All the area municipalities have three members on the Regional Council except

Nanticoke which has four. The area municipalities are responsible for local planning and development, severances and minor variances, local storm drains, local roads, parks, parking, firefighting, recreation and local garbage collection. The area municipalities each collect taxes for their own municipality, for the School Board and for the Regional Municipality of Haldimand-Norfolk. The Regional Municipality is responsible for delivery of health and social services, regional planning, regional engineering, policing, waste disposal and regional finances.

7. At the outset of the Hearing the parties tabled an agreed statement of facts which is set out in full here:

> #1 The paycheques of all employees of the Regional Municipality are signed by the Regional Chairman and come from the Regional Municipality's bank account, the same is true for the employees of the Board of Commissioners of Police.
>
> #2 That the reference on page 24 of Exhibit 15-19 which are the financial statements, that payments to OMERS, (the Ontario Municipal Employees Retirement System) on behalf of the Municipality's employees includes the police commission employees and the ONA nurses.
>
> #3 An agreement as to the evidence disclosed in exhibits #5 to #14 and Exhibit #15 tabs 2, 3, 5, 6, 7, 8, 9, 12, 14, 19, 20, 24, 27, 30 (excluding the attachment to the letter), 31, 32, 33, 39 and 40; that the documents pertaining to the negotiations might be filed without formal proof. The Respondents dispute the relevance.
>
> #4 With respect to the gender incumbency of the police commission employees, the male job classes are the constables, sargeant, staff sargeant, court administrator, assistant court administrator, inspector, superintendent, administrator, identification technician and transfer guard. The female job classes are private secretary, clerk typist, dispatcher, secretary, clerk general and manager of financial services.
>
> #5 The municipal councillors on the police commission are Mayor Orval Shortt, Mayor of Nanticoke and Robert Causyn.
>
> #6 There is no transfer of funds to the police commission by the Regional Municipality, all the expenditures of the police commission are paid for by cheques issued by the Regional Municipality.
>
> #7 The police commission reports are attached to the Regional Council's monthly agendas.
>
> #8 The Regional Municipality has requested the Board of Commissioners of Police to reduce its budget estimates where they believe such estimates are excessive.
>
> #9 The evidence as disclosed in the documents to be produced by the Respondents in response to the Applicant's May 4, letter.

8. The Haldimand-Norfolk Regional Board of Commissioners of Police has five members, two appointees of the Regional Council, Mayor Shortt and Mr. Causyn; and three appointees of the province, Mr. Wase, Mr. Mawhiney and Judge W.W. Leach. The appointees from the Regional Council are appointed or re-appointed after each regional municipal election and the terms coincide with the election periods for the Regional Council. The Board of Commissioners meets once a month and has two committees, the Property Committee and the Finance and Administration Committee. There has always been a Regional Council member on each of the committees. A sub-committee of Finance is the negotiating committee which is responsible for collective bargaining.

9. Section 14 of the *Police Act* sets out the mandatory budget and appeal process, specifically Subsections (2) and (3) require:

> 14.– (2) Every Board shall, on or before the 1st day of March in each year, prepare and submit to the council or each council responsible for maintaining the force, for its consideration and approval its estimates of all moneys required for the year to pay the remuneration of the members of the police force and to provide and pay for the accommodation, arms, equipment and other things for the use and maintenance of the force.
>
> 14.– (3) Where the council does not agree with the board on the estimates or on the adequacy of the number of members of the police force or the accommodation, arms, equipment or other things for the use and maintenance of the force, the Commission shall determine the question after a hearing.

10. The police Board prepares its budget each year through a process that involves the senior force staff and police chief, then analysis and approval at the Board of Commissioners. The Regional Municipality is consulted at an early stage only for information on fringe benefits such as OHIP and WCB. An annual actuarial study is done by the Regional Municipality on the sick leave funding and that report includes the police force staff. About 85% of the total budget is directed towards compensation each year. In 1987 the total police budget was $5,615,113. The budget estimate, once it is approved by the Board of Commissioners of Police is then forwarded to the Regional Municipality where the Municipality's staff under Mr. Johnstone the Treasurer, amalgamates that budget estimate with each of the Regional Municipality's departments to form the overall Regional Government budget estimates. The consolidated corporate budget is then forwarded to Regional Council for approval. The police budget estimate is contained under the budget item "protection of persons and property" along with the conservation authority and contains a line by line functional analysis of police operation and police administration divisions, with all salaries, benefits, capital expenditures and operating costs. The police portion is about five/sixths of the "protection of persons and property" budget item, and that item in 1988 was 17.3% of the entire budget of the Regional Municipality.

11. Although there was dispute in the evidence as to how active the budgetary approval process is or is not at the Regional Council stage, the parties have agreed that the police budget goes to Regional Council for approval in the form of a consolidated budget from the Regional Municipality's Finance and Administration Committee. The parties also agree that the Regional Council can either approve the budget or appeal the police portion to the Ontario Police Commission but not single handedly change or deny it. A budget has never been appealed to the Ontario Police Commission. Once the consolidated budget is approved, the role of ensuring there is no overspending rests with each of the department heads of the Regional Municipality and in the case of the police, with the Board of Commissioners.

12. Once the consolidated budget is approved, the Treasurer determines the mill rate and the taxes are levied for the Regional Municipality. After the mill rate is set, the options of funding are limited, hence the need to be as precise as possible in the budget estimates. The Regional Municipality receives money to discharge its budget obligations from a number of sources. Approximately 40% is derived from the taxes levied on the six area municipalities, who in turn

collect the taxes on behalf of the Regional Municipality. Another 40% comes from transfer payments from the province in the form of conditional or unconditional grants. Included in that is partial funding for the police from unconditional grants of a $50 per household levy for the Haldimand–Norfolk region. The remaining amount comes from charges to the Municipality such as fee charges for the Homes for the Aged and building permits, as well as from long term debt financing.

13. The Regional Municipality is also engaged in a financial planning process which is a five year capital and budget forecast, which includes the police Board under the "protection to persons and property" budget item. This is necessary in order to plan the financing of the Municipality's debt through debentures which must be approved by the Ontario Municipal Board. The annual official audit is done on the consolidated financial statement of the Regional Municipality of Haldimand–Norfolk including an analysis of all reserves and all expenditures of the police force in a consolidated format.

14. The Regional Municipality undertakes the financing and administration of the police budget, however, all operating cheques must be sanctioned by the police Board before they are processed through the Regional Municipality's accounting department. The bills must be approved by the Board's Manager of Finance before they are sent to the Regional Municipality which issues cheques for payment. The parties agreed that there is no transfer of funds to the police Board and that all of its expenditures are paid for by the Regional Municipality. Each month minutes of the police Board meetings are attached to the Regional Council agenda as information and a monthly activity report goes to the Council including information on reclassifications, grievances, arbitrations, promotions, complaints, training course results, *Police Act* hearings, investigations and other police activities. Any major additional funds required by the police Board must be submitted to the Regional Council for approval.

15. Most of the property used by the police force is owned by the Regional Municipality. Although the Board does not own any property, it does lease property in its own name. The Board does own its "rolling stock", the term used for its police cruisers. The Engineering Department of the Regional Municipality looks after repairs of the police vehicles at the Region's garage, with a charge back to the police budget for parts and labour. The regional police force is responsible for policing the majority of the population in the Regional Municipality including the six area municipalities, smaller centres such as Haggersville, Caledonia, Dunnville, Waterford and Port Dover; however, the rural areas and hamlets are policed by the Ontario Provincial Police.

16. The Chief of Police has responsibility for the day to day operation of the police force. He is under direction of the Board for administrative decisions such as tendering for police cruisers. He has independent responsibility under his oath of office and as per the *Police Act* for the law enforcement aspects. To quote from *The Law of Canadian Municipal Corporations* (ibid) at page 1155 "The duties and powers of a police force are original and not delegated; they are derived from the law and not from the board or municipality from whom they receive their appointment". The

Board's Manager of Finance is under direction of the Chief and the Board of Commissioners and is responsible for supervising the civilian staff, and for processing claims such as overtime, court time, purchase orders and accounts payable, ensuring the accuracy of the claims and accounts before forwarding them to the Regional Municipality for payment. The police Board is in regular communication with the Regional Municipality on issues such as financial administration, payroll services and the issuing of cheque requisitions. The police Board provides a courier service for all of the Regional Municipality's departments. The Treasurer has also undertaken general cost studies at the request of the Chief of Police such as the 1988 study of the comparative cost of policing in the region with policing in other jurisdictions.

17. Although day to day operations of the police force are under the direction of the Chief of Police and the staff, major financial decisions are required to be approved by the Regional Council. Three examples were the subject of considerable evidence at the hearing. First, was the proposed expansion of the regional police headquarters in Simcoe which the Board of Commissioners had proposed. The headquarters is owned by the Regional Municipality and thus would be renovated by its Engineering Department. The Board submitted a proposal to Regional Council in 1986 for a $350,000 expenditure to undertake this expansion. After some discussions with the Municipality's Finance and Administration Committee about the budget implications, the Board withdrew the proposal and determined that it would not expand but "make do" in 1987 with internal renovations and increased parking.

18. A second example illustrative of a major financial decision, was with respect to police capital replacement expenditures for the Board's rolling stock. A capital reserve was put in place because of the wide fluctuation in budgets each year due to police cruisers purchased as necessary, that necessity varying drastically from one year to the next, with one to eight cruisers being purchased each year. This fluctuation had meant 1% or more swing in the mill rate and had caused the Regional Councillors concern. The solution was to put approximately $150,000 into a capital reserve from which funds could be withdrawn as cruisers were required; this had the effect of stabilizing the budget after 1986. Although the evidence varied on whose idea the capital reserve was, it is clear that the concept was discussed between the Police Chief and the Regional Municipality's Treasurer Robert Johnstone several times, with budget estimates developed by Johnstone. The proposal went as a report from the Treasury Department through the budgetary process to approval by Regional Council. When the Commission requires funds for new cruisers, it makes a request to the Regional Council and once approved, the Treasurer transfers the money out of the reserve and into the police Board's budget.

19. The third example is the evidence relating to the sick leave benefits of employees. There is provision in the Regional Municipality's budget for a reserve for sick leave including the police employees, and a current issue is the funded versus unfunded liability. A large portion of that

reserve is unfunded and represents a fairly substantial liability for the Regional Municipality. Two years ago, the police Board "grandfathered" the sick time for existing employees in this system and negotiated a non-accumulating enriched short term sick benefit. The issue of the unfunded sick leave was not resolved in the 1989 budget and continues to be under discussion.

20. The *Police Act* gives the responsibility for the level of police servicing to the Chief of Police and the Board of Commissioners of Police, although the Regional Municipality has the right to complain to the Ontario Police Commission under Section 58 of the *Police Act*. The Ontario Police Commission acts in both a supervisory and advisory capacity and can conduct an investigation on its own initiative or at the request of the Municipality into the system of policing, administration of the force and the police needs of the Municipality. The Regional Municipality is also responsible for payment of any torts committed by the Chief of Police or his force as required by Section 24 of the *Police Act*.

21. There are four collective agreements for the police force: one covering police constables, sargeant and staff sargeant and one covering civilian personnel: secretary, dispatcher, clerk-typist, court administrator, assistant court administrator, identification technician and transfer guard. These two collective agreements have the Haldimand-Norfolk Regional Board of Commissioners of Police and the Haldimand-Norfolk Police Association as signators. The third collective agreement covers the inspector and the superintendent and the fourth contract covers the senior civilian administrative staff: administrator, manager of finance, clerk-general and private secretary. The Haldimand-Norfolk Regional Board of Commissioners of Police and the Haldimond-Norfolk Police Senior Officers Association are the signators to these two collective agreements.

22. The Board of Commissioners negotiates with the Police Association and the Senior Officers Association through its negotiating committee without the assistance of the Personnel Department of the Regional Municipality. The Board keeps the Regional Council informed of the progress of negotiations through its minutes sent to the Regional Council meeting each month. Although the police force is in the same pension plan as staff members of the Regional Municipality, the collective agreement differs in a number of aspects including long and short term sick leave, dental and life insurance, and special duty rates. Training of the police force is done primarily by the Ontario Police College, administered through the Ontario Solicitor General with curriculum set by the Canadian Association of Chiefs of Police, the Solicitor General and the Ontario Police Association. There is no transfer of seniority or sick benefits from any of the police bargaining units to any of the bargaining units in the Regional Municipality. In addition to employees covered by the four collective agreements, there are 20 casual employees who are hired by the police force and are not covered by a collective agreement. The salaries for the non-Council appointees to the Board of Commissioners are set by Regional Council through recommendation of its Finance and Administration Committee.

23. The Board of Commissioners is responsible for all hiring of police officers. The process entails interviews of candidates based upon a short list prepared by the senior officers and forwarded to the Board without recommendation. The civilian staff are hired by the Police Chief and the senior administrative staff, and the Board of Commissioners are not involved unless there is an upgrading or a promotion. The Personnel Department of the Regional Municipality has no involvement in either of these processes. The Chief of Police is not considered to be part of the senior staff of the Regional Municipality. The Board of Commissioners passes by-laws for regulation of the police force for conduct, discipline and dismissal in compliance with the requirements and disciplinary code of the *Police Act*. It involves a series of disciplinary stages including a hearing before the Police Chief or designated senior officer, with right of appeal to the Board of Commissioners, then to the Ontario Police Commission and finally to the court system. The Regional Municipality has no involvement in this. Personnel records for the police force are kept with the police Board. The payroll administration, including issuing pay cheques to the police force, is done by the Finance department of the Regional Municipality.

24. A codification of labour relations is provided for in Section 28 through to Section 39 of the *Police Act*; it provides for a process of negotiations and binding arbitration with the Ontario Police Arbitration Commission arbitrating on interest or rights disputes and providing mediation and conciliation services. Section 32(3) provides for the Regional Municipality to be a party to this arbitration, but there has been no such participation to date.

25. Subsection 35(1) of the *Police Act* binds the Regional Council to the collective agreement and to the decision of any arbitrator with respect to the four collective agreements. It reads:

> 35.-(1) Every agreement made under section 29 or 30 and every decision or award of an arbitrator is binding upon the council of the municipality, the board, where there is a board, and the members of the police force, other than the chief of police and any deputy chief of police.

Similarly, the *Police Act* relates the effective dates of each collective agreement to the fiscal periods and responsibilities of the Regional Municipality. Sections 36 and 37 state:

> 36.-(1) An agreement, decision or award takes effect upon the first day of the fiscal period in respect of which the council of the municipality may include provision in its estimates for any expenditures incurred in the agreement, decision or award, whether such day is before or after the date of the agreement, decision or award, unless another day is named in the agreement, decision or award in lieu thereof.
>
> (2) Where, pursuant to subsection (1), another day is named in an agreement, decision or award as the day upon which the agreement, decision or award is to take effect and such day is prior to the first day of the fiscal period in respect of which the council of the municipality may include provision in its estimates for any expenditures involved in the agreement, decision or award, any of the provisions involving expenses shall, notwithstanding the naming of such day, take effect from the first day of such fiscal period.
>
> 37. Where a request in writing is made under subsection 29(1) during a year ending with the 31st day of December and no agreement, decision or award has resulted therefrom at the time when the council is passing its estimates in the year next following, the council shall make such provision as in its opinion is adequate for the payment of any expenditure resulting from such agreement, decision or award.

26. In terms of perception of employees, Mr. Leigh a police constable with the Haldimand–Norfolk regional police force clearly perceived his employer to be the Haldimand–Norfolk Board of Commissioners of Police based upon his experience in collective bargaining with the Board. His evidence was that the *Police Act* makes it unlawful to take orders from anyone other than a senior police officer. In addition both Ms. Hosack the Manager of Finance for the Board and the Chief of Police gave evidence to indicate that they perceive their employer to be the Board. Ms. Peart, a public health nurse with the Municipality gave evidence that she perceived the police to be employees of the Regional Municipality. She based that perception on her knowledge that the police are called the Haldimand–Norfolk Regional Police, that they service the boundaries of the region and that their paycheques are signed by Keith Richardson the Regional Chair. Ms. Boughner, another public health nurse, believed the police to be part of the Regional Municipality's workforce because of the work she does with the police force in community information, education in the schools about drugs, and calling in the police on home visits. Her evidence was that the police service the same area as the public health nurses.

ARGUMENT

27. The Tribunal had the benefit of extensive and thoughtful submissions from Counsel. In addition, the Tribunal received and gave consideration to the following authorities submitted by Counsel: the *Pay Equity Act, 1987*, S.O. 1987, c.34; the *Police Act*, R.S.O. 1980, c. 381; *The Regional Municipality of Haldimand–Norfolk Act*, S.O. 1973, c. 96; *The Regional Municipality of Haldimand–Norfolk Amendment Act*, S.O. 1973, c. 155; *Regional Municipality of Haldimand–Norfolk Act*, R.S.O. 1980, c.435; *Labour Relations Act*, R.S.O. 1980, c.228; *Interpretation Act*, R.S.O. 1980, c.219; *Report of the Royal Commission on Equality in Employment*, vol. 1 (Ottawa: Canadian Government Publishing Centre, 1984)(Commissioner: Judge Rosalie Silberman Abella); *Cormier v. Alberta Human Rights Commission et al*, 85 C.L.L.C. 17.003; *R. v. Pereira* (1988), 20 C.C.E.L. 187; *Heerspink and Director, Human Rights Code v. Insurance Corporation of British Columbia*, 82 C.L.L.C. 17,014; *Ontario Human Rights Commission and O'Malley v. Simpsons–Sears* (1986), 7 C.H.R.R. D/3102; *Canadian National Railway Company v. Canadian Human Rights Commission*, 87 C.L.L.C. 17,022; *Robichaud and Canadian Human Rights Commission v. Her Majesty The Queen as represented by the Treasury Board* (1987), 8 C.H.R.R. D/4326; *Constitution Act*, 1982, as enacted by Canada Act 1982 (U.K.) 1982, C.11; *Telegram Publishing Company Ltd and William Amm and Others* (1973), 3 L.A.C. (2d) 175; *Sutton Place Hotel*, [1980] OLRB Rep. Oct. 1538; *Kennedy Lodge Inc.*, [1984] OLRB Rep. July 931; *Law Society of British Columbia and Attorney General of British Columbia v. Andrews and Kinersley* (1989), 36 C.R.R. 193; *York Condominium Corporation*, [1977] OLRB Rep. Oct. 645; *Province of Ontario Board of Internal Economy*, [1980] OLRB Rep. Jan. 88; *Waterloo County Roman Catholic Separate School Board*, [1977] OLRB Rep. Dec. 856; *National Union of Public Employees and Municipality of Metropolitan Toronto*, 61 C.L.L.C. 16,214; *Ralston Purina Canada Inc.*, [1979] OLRB Rep. June 552; I. Rogers, *The Law of Canadian Municipal Corporations*, (2nd ed. 1971); *Nicholson v. Haldimand–Norfolk Regional Board of*

Commissioners of Police, [1979] 1 S.C.R. 311; *Reference Under The Constitutional Questions Act* (1957), O.R. 28 (C.A.); *Re St. Catherines Police Association and the Board of Police Commissioners for the City of St. Catherines* (1971), 1 O.R. 430;*Myers and City of Guelph v. Hoffman*, [1956] 1 D.L.R. (2d) 272.

COUNSEL FOR THE APPLICANT:

28. Counsel for the Applicant, Ms. Cornish first identified the scope of the issue, the purpose of the statute and some of the historical background to the *Pay Equity Act, 1987*. Counsel cited pages 7 and 12 of the Ontario Government's *Green Paper* which preceded the passage of the *Act* and which characterized the discrimination the *Act* was designed to redress:

> The Government of Ontario's commitment to pay equity requires measures which address the undervaluation of women's jobs due to occupational segregation and wage discrimination.......
>
> The Government's commitment to the principle of pay equity does not depend upon the size of the wage gap or upon the portion or percentage of the wage gap which could be closed by a pay equity policy. Rather, it rests on the conclusion that some portion of the wage gap is due to discrimination which has not been eliminated by existing equal pay for equal work and equal opportunity initiatives. This portion of the wage gap can be narrowed or eliminated by a pay equity policy.

29. Ms. Cornish submitted that the *Pay Equity Act, 1987* is an anti-discrimination piece of legislation and that it ranks as a piece of legislation of "almost-constitutional or fundamental nature". As support for her position she quoted from recent Supreme Court of Canada decisions that find anti-discrimination law must be interpreted as to advance the broad policy considerations underlying it. She submitted that although some women are excluded from the *Act*, so too are certain groups not covered by the protection of human rights legislation and yet the law is no less of "almost-constitutional" nature. Counsel suggested that it is unusual for a statute to refer to affirmative action and yet here the Legislature saw fit to make such provisions. She urged the Tribunal to adopt a systemic approach to the *Act*, that a broad definition of employer was consistent with that approach and key to the identification of discrimination. She submitted that the issue of establishment is one crucial to the operation of the *Pay Equity Act, 1987*, affecting the ability of women throughout the province to receive wage adjustments. Counsel submitted that it is for the Tribunal to interpret the statute where no definition of employer exists. She then reviewed the existing tests in employment and common law and what elements advance the purposes of the *Act*. Ms. Cornish suggested that the persons that have historically been responsible for setting the discriminatory wage practices are the appropriate persons to redress the discrimination. She urged the Tribunal to adopt the test that whoever controls the purse strings is the employer for the purposes of pay equity.

30. Counsel then reviewed the history and role of the police and nurses in the Regional Municipality. She submitted that policing and nursing are municipal functions and that Section 14(2) of the *Police Act* requires the Municipality to take financial responsibility for policing, both in raising the funds and in deciding the expenditures. She submitted that the Regional Municipality is

the budgetary authority, that it provides the assets for accommodation, arms and equipment, that it supplies accounting, payroll and financial services. She submitted the Regional Councillors who sit on the police Board ensure that the Board has accountability to the Regional Council at an early stage of the budget setting process. She submitted that the system of municipal government both by statute and by practice in the facts of this case points to the Regional Municipality as the employer of the police force.

31. With respect to whether or not the Applicant's definition of establishment would effect existing labour relations, Ms. Cornish submitted that both the police and the nurses are bound by many Acts that impose restrictions on collective bargaining, such as human rights legislation. She suggested that the *Pay Equity Act, 1987* is no exception; there has been no exemption in the *Act* for the police and there is no conflict with the *Police Act* to find the larger establishment. Finally, Counsel submitted that the correspondence in evidence makes clear that the Regional Municipality and Board of Commissioners were deciding that the larger establishment could form a reasonable group for pay equity purposes, and that their change of mind was as a result of them assessing the impact of the comparators. Counsel asked us to draw the inference that the Regional Municipality ultimately decided the separation of the entities would limit the scope of comparisons available.

COUNSEL FOR THE BOARD OF COMMISSIONERS:

32. Counsel for the Board, Mr. Sheppard, submitted that the Board of Commissioners is an employer in its own right. He suggested that the Board was established by the provincial government before the Regional Municipality came into existence. Counsel submitted that the majority of members of the Board are appointed by the provincial government. He submitted that section 8(5) of the *Police Act* allows the Board to contract and to sue and be sued in its own name; that the Board has the power to pass its own by-laws and that the *Police Act* gives it responsibility for the quality of policing in the Region. Counsel rejected the notion that the Regional Municipality controls the budget, and he submitted that the Council cannot deny the budget, that its right to object to the Ontario Police Commission illustrates it does not control the "purse strings".

33. Mr. Sheppard rejected the Applicant's notion that the *Pay Equity Act, 1987* is of "almost-constitutional" nature. He submitted that an act of "almost constitutional" nature would cover all women and under this *Act*, women employed in workplaces of fewer than ten employees are not covered. He submitted that although the law is important, it is "labour legislation, no more, no less". Mr. Sheppard quoted from the Legislative Hansard of November 24, 1986 when Attorney General Ian Scott introduced the Pay Equity Legislation as illustrative of the non-all encompassing nature of the law:

> We realize some Ontario workers may find themselves without a comparison group because they are in a workplace that is totally female. Let us take childcare workers as an example. Childcare workers in municipalities will have male comparison groups, but those in small non-profit childcare centres may be working in an all-female establishment. The bill, which was drafted as gender-based anti-discrimination legislation, will not assist the latter group, whose work has been undervalued and underpaid for too long.

34. He noted that section 28 of the *Police Act* prohibits trade union membership and calls for a system of collective bargaining very different from the standard labour relations context. Mr. Sheppard submitted that in the absence of a definition of employer in the legislation, the Government never intended the Tribunal to decide the definition. He suggested that the well established definition in Ontario Labour Relations Board case law ought to be used by the Tribunal. He cited the tests used by the Labour Relations Board in *York Condominium* (supra) and cases following, and submitted that on the basis of who exercises direction and control over employees, who hires and fires, who has the power to discipline, the perceptions of the employees and whether there was an intention to create an employer/employee relationship; that the Board of Commissioners is clearly the employer. He submitted that the burden of remuneration test is almost irrelevant in this case, and that the Regional Municipality is merely a conduit for raising tax monies for the Board of Commissioners.

35. Counsel submitted that the Tribunal has no authority to restructure the collective bargaining units. He suggested that a remedial statute should be interpreted to do minimal damage and that the larger definition of establishment would complicate pay equity negotiations. Counsel cited authorities on the status of police as officers of the law and submitted that the idea of police as comparators for nurses is a "far-fetched notion" considering the police's job and the dissimilarities.

COUNSEL FOR THE REGIONAL MUNICIPALITY:

36. Counsel for the Respondent, Mr. Wearing submitted that the *Pay Equity Act, 1987* is not human rights legislation nor is it "near-constitutional" as the Applicant would suggest. He suggested it is important legislation introduced to deal with discrimination with respect to compensation, but that it is not a statute with application to the entire populace as it only gives remedy to women in workplaces of ten or more employees. Counsel characterized the law as an important labour relations statute and submitted that the established benchmarks of employer in Ontario Labour Board cases such as *Sutton Place* (supra) and *Kennedy Lodge* (supra) ought to be adopted. He suggested that to do otherwise would bring instability to the collective bargaining relationship.

37. Counsel submitted that based upon the Applicant's pleadings, its case for employer is not made out; that the Applicant has not met the tests for employer which are well-established in employment and common law. Counsel traced the evidence as it relates to the Labour Board tests. He submitted that the criteria of who hires, fires and disciplines are part of the wage setting practices that are clearly within the control of the Board of Commissioners. Counsel submitted that although policing is a municipal function, so too is the School Board which is not part of the Regional Municipality. He urged the Tribunal to make a finding that the communications of the Board of Commissioners with the Regional Municipality are indicators of good management, but the real superintending power rests with the Ontario Police Commission, not the Regional Municipality.

38. Counsel reviewed the statute and submitted that the legislation has not said that every workplace is liable or done something "prohibitive with respect to wages"; rather the *Act* is a scheme of inquiry and Section 6 provides a framework and procedure to determine whether or not there have been prohibitive wage practices. He suggested that the Applicant's request to seek a broader

definition of establishment was premature because the other possibilities for comparators had not yet been examined through the process. He submitted that nurses and police are specific and specialized work and that they are in no way similar in functions they provide or the regulatory agencies which govern them.

DECISION:

39. In reaching a decision in this case, the Tribunal has considered a number of issues raised by the parties. First, what is the nature of the *Pay Equity Act, 1987* and what is the issue before this panel? Second, can the Tribunal define employer for pay equity purposes and what usefully can be drawn from existing employment and labour relations jurisprudence and the common law as tests for employer and establishment. Third, what are the tests that the Tribunal should apply in a pay equity context? Finally, how do the Tribunal's tests apply to the fact situation before us?

40. The Tribunal is able to characterize the *Pay Equity Act, 1987* in many different ways as Counsel have suggested. However, categorizing the "nature" of the *Act* does not assist our determination of this case; rather we look to the *Act* itself and its purpose and objectives. The *Pay Equity Act, 1987* has elements of anti-discrimination legislation both in its historical development and in its content. The law is a recognition of the systemic nature of wage discrimination and provides a strategy to deal with the discrimination. To quote Judge Rosalie Abella in the *1984 Report of the Royal Commission on Equality in Employment*, at page 9:

> Systemic discrimination requires systemic remedies. Rather than approaching discrimination from the perspective of the single perpetrator and the single victim, the systemic approach acknowledges that by and large the systems and practices we customarily and often unwittingly adopt may have an unjustifiably negative effect on certain groups in society. The effect of the system on the individual or group, rather than its attitudinal sources, governs whether or not a remedy is justified.
>
> Remedial measures of a systemic and systematic kind are the object of employment equity and affirmative action. They are meant to improve the situation for individuals who, by virtue of belonging to and being identified with a particular group, find themselves unfairly and adversely affected by certain systems or practices.

and at page 232:

> Equal pay is an integral element in the implementation of employment equity. It must be included in any undertaking by employers to make the practices in the workplace more equitable.

and at page 254:

> Employment equity "requires a special blend of what is necessary, what is fair and what is workable".

41. The preamble of the *Pay Equity Act, 1987* reflects this historical wage inequity and the need to take pro-active steps to address it. The preamble states that "whereas it is desirable that affirmative action be taken to redress gender discrimination in the compensation of employees employed in female job classes in Ontario;" this *Act* has been enacted. The preamble, along with the purpose of the *Act* outlines the nature of the discrimination the legislation is intended to address

through the affirmative actions of employers. The purpose of the *Pay Equity Act, 1987* is found in Section 4:

> 4.-(1) The purpose of this Act is to redress systemic gender discrimination in compensation for work performed by employees in female job classes.
>
> (2) Systemic gender discrimination in compensation shall be identified by undertaking comparisons between each female job class in an establishment and the male job classes in the establishment in terms of compensation and in terms of the value of the work performed.

42. The law also has a labour relations component in that the framework for achieving pay equity in unionized workplaces is a collective bargaining one, with both rights and obligations on employers and bargaining agents. The *Act* imposes the obligation to negotiate pay equity plans and provides a detailed mechanism by which pay equity will be accomplished. The law gives clear recognition to the history and structure of collective bargaining in this province. It is however, unlike other collective bargaining statutes in that it has an interest in the content and process of pay equity negotiations in order to ensure that affirmative action is taken to redress wage discrimination. We do not accept the submissions of Counsel that the statute is merely a collective bargaining statute; not only because of its anti-discriminatory nature, but because there are approximately 79% of women in the Ontario workforce who are not afforded the protections of a collective agreement. The *Act* covers these non-unionized women in workplaces of more than ten employees through a very different implementation and complaint mechanism. It is a statute having the specific purpose of redressing wage discrimination with elements of both human rights and labour relations law.

43. The statute contains no definition of employer. The *Act* does however define establishment in terms of employer and in that context the Tribunal must assess the meaning of employer. What are the principles underlying the approach the Tribunal should take in defining employer? In order to look at the interpretive principles which apply to our consideration of this issue, we rely in part on recent judgments of the Supreme Court of Canada. The Supreme Court wrote in *Canadian National Railway Company v. Canadian Human Rights Commission* (supra) at p. 16,263:

> Human rights legislation is intended to give rise, amongst other things, to individual rights of vital importance, rights capable of enforcement, in the final analysis, in a court of law. I recognize that in the construction of such legislation the words of the Act must be given their plain meaning, but it is equally important that the rights enunciated be given their full recognition and effect. We should not search for ways and means to minimize those rights and to enfeeble their proper impact.

The Court went on to cite the federal *Interpretation Act* and the Tribunal finds that the same section in the Ontario *Interpretation Act*, R.S.O. 1980, c. 219, gives us guidance. Section 10 says:

> 10. Every Act shall be deemed to be remedial, whether its immediate purport is to direct the doing of any thing that the Legislature deems to be for the public good or to prevent or punish the doing of any thing that it deems to be contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.

44. The *Act* addresses wage discrimination which has developed over time through systems and practices of compensation. This is not necesssarily the result of individual practices, but in large measure is due to institutional practices which have resulted in wage discrimination. The legislation was designed not to punish or lay blame for inequitable wage practices, but to provide an affirmative action plan to identify and redress the discrimination. Just as the *Act* does not require wage discrimination to be proven as intentional, so too it does not hold those responsible for creating wage inequities as "guilty". In that respect we do not adopt the submission by the Applicant that one of the tests the Tribunal should apply is "whoever is responsible for the wage discrimination should be made to pay". The wage discrimination which exists is the culmination of individual practice, institutional wage practices and a history of employment and compensation in this province which historically has not recognized the value of women's labour in the workforce. The Legislature recognized and addressed these very dynamics in the construction and passage of this legislation. The object of the law is not to punish, but to give relief and redress to women for wage discrimination.

45. The Tribunal is assisted by the extensive case law in employment and labour relations. The various tests currently used have arisen from the particular problem that each court or tribunal is mandated to address, such as taxation liability for injuries or the scope of collective bargaining. The Tribunal must utilize those definitions and those indicia for determining employer only in so far as they assist the Tribunal to define employer in statutory context of this legislation. The Tribunal must decide who is the employer on the facts in the case before it; however, the tests that it applies must utilize criteria that best accord with the objectives, structure and scheme of the *Pay Equity Act, 1987*.

46. The definition of employer for one Act does not restrict another definition for purposes of pay equity. It is for the Tribunal to interpret the statute where no definition of employer exists. There is a line of case law which assists the Tribunal in approaching this issue. The Alberta Court of Queen's Bench discussed the definition of employer in the context of alleged discrimination in hiring in *Cormier v. Alberta Human Rights Commission et al* (supra) page 16,026:

> In reaching my conclusion, I start with two premises. The first premise is that words used in stating a legal rule in one context may not mean the same where the words may be used to express a legal rule in another context. This is so whether the rule is one of statute or of common law. The meaning of the same words may be found to be different if the two legal rules reflect different policy considerations and perform different social functions. Thus, for example, the notions of 'master and servant', 'employer and employee', and 'employment' when those words are used in enunciating a legal rule that X is vicariously liable for the torts of Y, are employed as a means of delineating the limits of what is desirable as a matter of fairness and reflecting usual expectations as to who should bear the risk of loss, as well as discouraging negligent work practices. The meaning attached to those words in that context and for that purpose may be of no assistance in determining the sense in which the same words are used by the legislature when it enunciates a legal rule that reflects other policy considerations. It becomes necesssary to examine the statute in which that legal rule is prescribed, in order to determine the sense in which the words are used in it

and at page 16,028:

> The words 'employer', 'employ' and 'employment', as used in the present statute must be regarded as ambiguous. They are capable of bearing either meaning just referred to, and

> perhaps intermediate meanings. There being ambiguity, the meaning to be attributed to them should be liberal, as far as that is consistent with the purpose of the Act and not inconsistent with some other provision of the Act–which must be read as as whole. I can find no impediment in the Act as a whole that stands in the way of giving a liberal interpretation to the words.

We also make reference to *Regina v. Pereira* (supra). The Alberta Court of Queen's Bench, May 18, 1988 wrote at page 200:

> There is, in my view, an absence of statutory language in s.1(1)(c) of the *Employment Standards Act* that affords an exhaustive definition to the meaning of the words 'employee' and 'employed'. The meaning and scope of the terms 'employee' and 'employed' must in my view be ascertained from both the statutory provisions and objects of the *Employment Standards Act*. By so doing, the words in question might have a broader or a narrower meaning than would result from the application of the common law four fold test which would be appropriate in deciding whether there is vicarious liability.
>
> The words 'employee' and 'employed' as those words appear in the definition section of the *Employment Standards Act* must not be 'disembodied' from the *Act*, for the purpose of determining their meaning, but must be read and defined in "the context of the scheme and purpose of the legislation" and the meaning attributable to the words must be as contained in that context.

47. It is in this context that we reject the suggestion that the Tribunal adopt wholesale the definition of employer as defined by the Ontario *Labour Relations Act*. Where the Legislature has sought to incorporate a definition from the *Labour Relations Act* in its entirety, it has done so. For example, the definition of "bargaining agent" in the *Pay Equity Act, 1987*, makes reference to the definition in the *Labour Relations Act*. Where the Legislature saw fit to limit the Tribunal's jurisdiction, it has also done so; for example the definition of "establishment" has specific geographical limits. We cannot accept that in the absence of some definition or direction by the Legislature, that we are bound absolutely by the definition of employer contained in the Ontario *Labour Relations Act* which has a very different purpose, that of regulation of labour relations. The purpose of *Pay Equity Act, 1987* in contrast, is to redress gender wage discrimination through the implementation of pay equity programs. It is therefore more appropriate to consider those tests developed in the fields of labour relations, employment, human rights, employment standards and the common law which will assist in accomplishing the objectives of the *Pay Equity Act, 1987*. Then those criteria will be applied to the facts before the Tribunal to assist in finding the employer and establishment for pay equity purposes in any given case.

48. What elements does it make pay equity sense to adopt from existing case law? We find the general approach of the Labour Board a useful one; the jurisprudence states that a flexible approach must be adopted and no one indicium is determinative of the issue of who is the employer. To quote from *Kennedy Lodge* (supra) which comments on the tests developed in the *York Condominum* case (supra) at paragraph 42:

> The Board was careful not to rank these criteria but rather, made it clear that each must be considered and assessed on the particular facts of the case.

That flexibilty in approach is compelling, particularly in the context of a tribunal which is interpreting a new statute for the first time. The criteria which the Tribunal will apply may have more or less relevance in each fact situation, as the implementation of the law evolves and as other cases come before the Tribunal.

49. In *York Condominium* (supra), a landmark case on the definition of employer, the Labour Board wrote at paragraph 10:

> In determining which of two or more parties is or are the employer(s) of certain employees, the Board has applied a series of criteria which are listed below:
>
> (1) The party exercising direction and control over the employees performing the work...
>
> (2) The party bearing the burden of remuneration...
>
> (3) The party imposing the discipline...
>
> (4) The party hiring the employees...
>
> (5) The party with the authority to dismiss the employees...
>
> (6) The party who is perceived to be the employer by the employees...
>
> (7) The existence of an intention to create the relationship of employer and employees...

With respect to the party exercising direction and control over the employees, the Tribunal finds this criteria may be of assistance in terms of who makes the policy decisions regarding the nature of the work to be done and the assignment of responsibility for that work. It is not however useful with respect to the day to day control over employees, which is more a test for the regulation of labour relations. Similarly, we do not find the tests of the right to hire, fire or discipline to be of particular assistance for pay equity purposes. The persons responsible for those activities may or may not have anything to do with decision-making in wage setting practices. Clearly the criteria of which party bears the burden of remuneration is a useful one for the Tribunal to consider because compensation of employees is the major focus of the *Pay Equity Act, 1987* and the legislation makes specific provision for a percentage of payroll to be directed towards wage adjustments to achieve the purpose of the *Act*. In terms of perception of employees, this may also be a helpful criteria in assessing who is the employer. We need not at this point consider the usefulness of the last test, whether there was the existence of an intention to create the relationship of employer and employees since it was not an issue in this case.

50. Where the factors point in a number of directions, it is useful to look at the purpose of the statute. The Ontario Labour Relations Board has utilized its purpose clause in much the same way. In *Sutton Place* (supra), in attempting to find the employer for "labour relations purposes" the Labour Board said at paragraph 43:

> The weight to be accorded the various indicia of employer status set out in *York Condominium* cannot be assigned in a vacuum. When one of the factors is combined with another in the hands of one company, the Board may conclude that they accurately identify

> the employer, though while standing alone or in some other combination they may not. The significance of each indicator can only be ascertained through an appreciation of how they all fit together within the facts of each case. It is only then that the Board can decide which factors in the particular case most accurately reflect and identify the employer for collective bargaining purposes.

51. After carefully weighing the submissions of Counsel, and considering existing case law, the Tribunal believes that four tests or criteria should be applied when approaching the question of who is the employer. We do not intend these tests to be all encompassing. As with any new statute, interpretation must be approached in an incremental fashion, having regard to the possibility that future cases may well add to the tests. The criteria which the Tribunal finds useful to apply are:

> 1. *WHO HAS OVERALL FINANCIAL RESPONSIBILITY?*
>
> Indicia of this test include: Who has responsibility for the budget? Who bears the financial burden of compensation practices, and the burden of wage adjustments under the Act? Who is responsible for the financial administration of the budget? What is the shareholder investment or ownership? Who bears the responsibility of picking up the deficit or benefiting from the surplus?
>
> 2. *WHO HAS RESPONSIBILITY FOR COMPENSATION PRACTICES?*
>
> The indicia for this criteria include: Who sets the overall policy for compensation practices? Who attaches the value of a job to its skill, effort, responsibility and working conditions? What is the labour relations reality, who negotiates the wages and benefits with the union or sets the wage rate in a non-unionized setting?
>
> 3. *WHAT IS THE NATURE OF THE BUSINESS, THE SERVICE OR THE ENTERPRISE?*
>
> Within this test the following are helpful indicia: What is the core activity of the business, service or enterprise? Is the work in dispute integral to the organization or is it severable or dispensible? Who decides what labour is to be undertaken and attaches that responsibility to a particular job? What are the employees perceptions of who is the employer?
>
> 4. *WHAT IS MOST CONSISTENT WITH ACHIEVING THE PURPOSE OF PAY EQUITY ACT?*
>
> If there is more than one possible employer, it assists the Tribunal in its determination to make reference to the purpose and objectives of the *Pay Equity Act, 1987*.

52. In applying those tests to the facts of this case, the Tribunal finds the following. With respect to who has overall financial responsibility, it is evident that the financial liability rests with the Regional Municipality. The Board of Commissioners has carriage of the budget process in its initial stages, but the consolidation of the budget, the responsibility for major financial decisions and the levying of taxes, securing of grants or long term financing all rest with the Municipality. With respect to who bears the burden of payouts under the *Act*, clearly the financial burden will fall to the Regional Municipality. In terms of financial administration, the Board's Manager of Finance makes the decisions with respect to daily and monthly expenditures, and is the approval authority with respect to time sheets, claims and requisitions. The administrative role of the Municipality is to provide payroll services, administration with respect to the issuing of cheques, budget forecasting and costing studies. The Regional Municipality has responsibility for assuming any debts; the Tribunal received no evidence as to who would benefit from a surplus. Finally, the indicium of ownership is not of assistance here, given the public sector nature of the dispute.

53. With respect to the test of who has responsibility for compensation practices; it is clear that the Board of Commissioners sets the overall policy for compensation practices. However, two of the five Board members are elected members of Regional Council, representing the interests of the Regional Municipality at the Board. The Municipality ultimately bears the responsibility for any compensation rendered, as required by the *Police Act*. With respect to who attaches the value of a job to its skill, effort, responsibility and working conditions; it is the Board which has this responsibility. Finally, with respect to who negotiates wages and benefits with the police, the evidence was undisputed that this is under authority of the police Board.

54. In assessing the third test, what is the nature of the service, it is useful to make reference to the statutes creating both the Municipality and the Board. *The Regional Municipality of Haldimand-Norfolk Amendment Act*, S.O. 1973, c.155 gives the Board responsibility for policing. The *Police Act*, R.S.O. 1980, c.381 gives the Board administrative authority, however Section 2 makes clear that the responsibility for policing is a "municipal" function. Section 2(1) of the *Police Act* requires that: "Every city and town is responsible for the policing of and maintenance of law and order in the municipality and for providing and maintaining an adequate police force in accordance with the police needs of the municipality". The core activity of the police force is "policing" and it is the responsibility of the Municipality. Given this responsibility, it is obvious that the police force is integral and not dispensible; there is a statutory obligation for the Municipality to provide police services. With respect to who decides what work is to be undertaken and who attaches the responsibility to a particular job, it is the *Police Act* that governs the duties and functions of police officers under Sections 46 and 47, and it is the Board that ensures the work is carried out and responsibilities are assigned. In terms of perceptions of employees, the Tribunal heard evidence that was not helpful or determinative in this case. Our only comment on Tribunal Member Laing's dissent is with respect to her observation on the Schedule appended to the *Act*; the Schedule has as its only purpose a definition of what the public sector consists of for purposes of the *Act*, and it does not assist the Tribunal in determining the question of who is the employer.

55. The fourth test to assist the Tribunal in its determination is: what is most consistent with achieving the purpose and objectives of the *Pay Equity Act, 1987*. The purpose of *Act* as stated in Section 4 is to redress systemic gender discrimination in compensation for work performed by employees in female job classes. In the case before us, the Applicant seeks to have the Regional Municipality declared the employer and as such encompass the police in the establishment. The request is part of its efforts to redress systemic wage discrimination and this definition would not preclude the Applicant seeking comparisons for its members with job classes in the police force.

56. Such comparisons are contemplated by the purpose section of the *Act* which specifies that systemic gender discrimination is to be identified by undertaking comparisons between female and male job classes in the establishment in terms of compensation and in terms of value of the work performed. Subsection 6(5) of the *Act* specifies that where there are no male job classes within a bargaining unit in which the work performed is of equal or comparable value, that a female job class shall be compared to male job classes throughout the establishment. The *Act* contemplates that in the process to achieve pay equity, the strict parameters of bargaining unit are to be crossed in order

to find job classes. The *Act*, while providing for existing collective bargaining structures to be recognized, also makes provision to ensure that women covered by the legislation can seek comparisons beyond the bargaining unit and throughout the establishment once it is determined that there are no male comparators in the bargaining unit. The *Act* contemplates the interrelationship of pay equity and collective bargaining with rights and obligations placed upon employers and bargaining agents throughout the pay equity negotiation process. Those rights and obligations are a vital part of the implementation structure of the *Act*.

57. Whether the job class comparisons take place within the bargaining unit or across bargaining units where provided for, the legislation has contemplated the final meshing of labour relations and pay equity in Subsection 13 (10) which specifies that the pay equity plan "prevails over all relevant collective agreements and the adjustments to rates of compensation required by the plan shall be deemed to be incorporated into and form part of the relevant collective agreements." The law does not seek to disrupt collective bargaining relationships nor to reshape the discription of existing bargaining units. Just as bargaining agents and employers are bound by other remedial legislation such as the *Pension Benefits Act, 1987* and are required to negotiate to conform with new standards of public policy, so too they must meet the requirements of the *Pay Equity Act, 1987*. Those requirements elicit the assistance of existing collective bargaining structures, they do not seek to dismantle them. It is the adjustments to rates of compensation that become part of existing collective agreements, it is not required that the plans do. In this way the statutory framework of the *Act* provides for the minimum disruption to existing collective agreements while still making provision for the achievement of the legislation's purpose, the redress of systemic gender wage discrimination between female and male job classes in an establishment of the employer. Although we do not rely on it, we are mindful of the fact that the exchange of letters in Exhibit 15 on the question of establishment indicates that early in the process, the Regional Municipality seriously considered this definition of employer and establishment a viable option in the development of a pay equity plan. Where there is more than one possible employer, the Tribunal should decide what is "necessary, fair and workable" within the structure of the *Pay Equity Act, 1987* and should make a finding that best serves the needs of those the *Act* is aimed at benefiting.

58. The Tribunal has the discretion to decide who is the employer for purposes of the *Pay Equity Act, 1987*. The Tribunal in applying its four tests, finds on balance that the Regional Municipality is the appropriate employer. The indicia with respect to overall budgetary control and liability being the responsibility of the Regional Municipality; the active role of the Regional Councillors on the police Board with respect to labour relations and compensation practices; the fact that the Regional Municipality will bear the financial burden of wage adjustments under the Act; the responsibility of the Regional Municipality to provide policing and nursing as part of its municipal function; and considering the purpose of the *Pay Equity Act, 1987*; the Tribunal finds that the Regional Municipality is the employer in this case. The majority of the Tribunal finds the Applicant has made its case in establishing that the Regional Municipality is the appropriate employer of the police for purposes of the *Pay Equity Act, 1987* and since Subsection 1(1) of the *Act* defines establishment as

all employees of an employer employed in a geographic division, accordingly, we find the police to be part of the Regional Municipality's establishment. The issue of whether job classes of the police force are to be used as male comparators was not before the panel at this time; it will form part of the negotiations these parties undertake and we make no ruling on this.

59. For the foregoing reasons, the Tribunal finds that the Haldimand-Norfolk Regional Police Force is part of the establishment of the Regional Municipality of Haldimand-Norfolk and that the Regional Municipality of Haldimand-Norfolk is the employer of the police force for the purposes of the *Pay Equity Act, 1987*.

DECISION OF TRIBUNAL MEMBER SHARON LAING, JUNE 30, 1989:

1. I dissent from the majority on the key findings that:

i) the Haldimand-Norfolk Regional Police Force is part of the establishment of the Regional Municipality of Haldimand-Norfolk, and
ii) the Regional Municipality of Haldimand-Norfolk is the employer of the police force for the purposes of the *Pay Equity Act, 1987*.

2. Counsel for the Applicant submitted that the nurses are entitled to seek out such job classes as they see fit and accordingly, she argued that the Tribunal should interpret the statute to allow a broad definition of establishment in order for this to be accomplished. The historical undervaluation of women's work was addressed by the legislators in proclaiming the *Pay Equity Act, 1987* however, as described by counsel for the Respondent Municipality, the structure of the *Act* is precise in its targets and remedies. The Tribunal's role is to ensure the achievement of pay equity within the limitations of the statute.

3. I accept the four criteria identified in the majority decision at paragraph 51. I concur that these tests may be added to or further developed as future cases are determined by the Tribunal.

4. The indicia with respect to overall financial responsibility recgonize participation by both the Regional Municipality and the Regional Board of Commissioners of Police. I am not persuaded by the Applicant's argument that the Regional Municipality ultimately controls the "purse strings" of the Regional Board of Commissioners of Police. It is clear that the final determination of budgetary estimates regarding policing is not made by the Regional Municipality but rather, by the Ontario Police Commission. Subsection 14(3) of the *Police Act* reads as follows:

> Where the council does not agree with the board on the estimates or on the adequacy of the number of members of the police force or the accommodation, arms, equipment or other things for the use and maintenance of the force, the commission shall determine the question after a hearing.

That such a hearing has not taken place between these parties does not diminish the fact that the ultimate budgeting authority does not rest with the Regional Municipality.

5. In determining who bears the responsibility for compensation practices, it is evident that the Regional Board of Commissioners of Police is responsible for the overall policy decisions with respect to compensation practices; attaching the value of a job to its skill, effort, responsibility and working conditions; and negotiating the wages and benefits with the police force. The uncontradicted evidence of Mr. Orval Shortt, Mayor of Nanticoke, Member of the Regional Council and Chair of the Board of Commissioners of Police was precise and relevant. He clearly distinguished his role and mandate as a Regional Councillor from his role as Chair of the Board of Commissioners of Police. He receives no instruction or directive from the Regional Municipality while sitting as Chair for the Board of Commissioners of Police and is "duty bound" in that role to do only what is best for the Board.

6. Various statutes are relied upon by the majority in their reviewing of the "nature of the service test". I do not find this reference to the statutes very helpful. On the one hand, the *Police Act* recognizes that municipalities have the responsibility to provide policing in their geographical territory. On the other, the statute which is specific to this municipality, *The Regional Municipality of Haldimand-Norfolk Amendment Act*, S.O. 1973, c.155 returns that policing responsibility and function to the Regional Board of Commissioners of Police. Subsection 8(5) of the *Police Act*, describes the Board's power to contract and sue, and establishes the Board of Commissioners of Police as a separate legal entity. Further, the *Pay Equity Act, 1987* contemplates these bodies as distinct in subsections 1(a) and (b) of the Schedule to the *Act*, by identifying them separately.

7. The fourth test raises the question of what is most consistent with achieving the purpose and objectives of the *Pay Equity Act, 1987*. In order for the Tribunal to be persuaded to include the police in an expanded definition of establishment and employer in this case, I find it necessary for the Applicant to prove that the purposes of the *Pay Equity Act, 1987* would not otherwise be achieved. The Applicant has not made out such a case, and consequently this test does not direct me to the outcome arrived at by the majority.

8. Finally, accepting the majority decision in this matter is to attach to the Regional Municipality the responsibility for establishing and maintaining compensation practices that provide for pay equity, as required by subsection 7(1) of the *Pay Equity Act, 1987*. Such responsibility contradicts the well established labour relations reality between the Regional Board of Commissioners of Police and the Regional Police Force. In the absence of evidence by the Applicant Union that such disruption is necessary in order to achieve pay equity, I find the Regional Police Force is not part of the establishment of the Regional Municipality, and the Regional Board of Commissioners of Police is the employer of the police force for these purposes.

0003-89 Ontario Public Service Employees Union, Applicant v. **Cybermedix Health Services Ltd.**, Respondent

Before: Beth Symes, Chair and Members Donald Dudar and Susan Genge

Appearances: Elizabeth J. Shilton Lennon, Isla Peters, Martin Sarra, Susan Tomchyshn for the Applicant, Ontario Public Service Employees Union; Mary Ellen Cummings, James le Noury, and Mary Jane Tomé for the Respondent, Cybermedix Health Services Ltd.

Pay Equity Process - Negotiation - Good Faith - Disclosure

The Applicant alleged that the Respondent had breached its duty to negotiate pay equity in good faith by failing to disclose certain information requested during bargaining. The Tribunal considered:

1)what information the employer was required to disclose; and

2)when in the bargaining process it was obliged to release information.

The Tribunal ordered partial disclosure.

The parties are jointly responsible for the process and the content of the pay equity negotiations. In order to meet these obligations, information relevant to pay equity issues must be disclosed so that rational and informed discussions may occur. Unlike collective bargaining, the Act sets out the issues to be bargained: the gender neutral job comparison system; and the component parts of the pay equity plan. Disclosure must be made whenever the parties cannot agree on an issue without the information requested. Both parties are entitled to sufficient information to make informed choices at all stages of the process. In this case, there are no male comparators within the bargaining unit. Accordingly, the union is entitled to information relating to classes outside the bargaining unit, including: job titles; gender compositions of positions; compensation schedules, salary grades or range of salary rates per position; and job descriptions. No justification for disclosure of the names of employees outside the bargaining unit was established.

PEHT - Hearing - Procedure

An issue arose as to the nature of proceedings before the Tribunal.

A proceeding before the Tribunal is not an appeal, but rather is a hearing de novo on the issues in dispute. Evidence on those issues must be called at the hearing by the parties and be subject to cross-examination.

Processus d'équité salariale - Négociation - Mauvaise Foi - Divulgation

Le requérant prétend que l'intimé a manqué à son devoir de négocier un programme d'équité salariale de bonne foi car il n'a pas divulgué certains renseignements qu'on lui avait demandés pendant les négociations. Le Tribunal a étudié les questions suivantes:

1) quels renseignements l'employeur était-il tenu de divulguer;

2) à quelle étape des négociations était-il tenu de faire connaître ces renseignements.

Le Tribunal a ordonné une divulgation partielle des renseignements.

Les parties sont toutes deux responsables du processus et du contenu des négociations en matière d'équité salariale. Afin de respecter ces obligations, il importe que les renseignements sur des questions d'équité salariale soient divulgués pour que des discussions rationnelles et éclairées aient lieu. Contrairement à la négociation collective, la Loi précise les questions qui doivent faire l'objet de négociations : un système non sexiste de comparaison et les composantes du programme d'équité salariale. Les renseignements doivent être divulgués chaque fois que les parties ne s'entendent pas sur une question sans les renseignements demandés. Les deux parties ont le droit d'obtenir des renseignements suffisants pour faire des choix éclairés à toutes les étapes du processus.

Dans la présente cause, il n'y a pas d'emplois masculins dans l'unité de négociation avec lesquels on puisse faire des comparaisons. Par conséquent, le syndicat a le droit d'obtenir des renseignements sur des catégories d'emplois qui existent à l'extérieur de l'unité de négociation, notamment : titres de postes, nombre de personnes de chaque sexe occupant les postes, grilles de rétribution, niveaux de salaire ou gammes des taux de salaire par poste; et description d'emploi. La nécessité de divulguer les noms des employés travaillant à l'extérieur de l'unité de négociation n'a pas été établie.

T.É.S. - Audience - Procédure

Une question a été soulevée en ce qui concerne la nature des instances devant le Tribunal.

Une instance devant le Tribunal n'est pas un appel, mais plutôt une nouvelle audience relative aux questions en litige. Lors de l'audience, les parties doivent convoquer des témoins en ce qui concerne les questions en litige et ces témoins peuvent être contre-interrogés.

Cases Referred To

Devilbiss (Canada) Limited, [1976] O.L.R.B. Rep. March 49

Forintek Canada Corp., [1986] O.L.R.B. Rep. Apr. 453

Globe Spring & Cushion Co. Ltd., [1982] O.L.R.B. Rep. Sept. 1303

Royal Conservatory of Music, [1985] O.L.R.B. Rep.. Nov. 1652

The Ontario Cancer Treatment and Research Foundation (Thunder Bay Clinic), [1985] O.L.R.B. Rep. May 705

The Windsor Star, [1983] O.L.R.B. Rep. Dec. 2147

Statutes Referred To

Pay Equity Act, 1987, S.O. 1987, c.34, App., ss. 1, 6, 7, 13, 14, 25, 34.
Statutory Powers Procedure Act, R.S.O. 1980, c.484.

DECISION OF THE TRIBUNAL, JULY 6, 1989:

1. This is an application by the Ontario Public Service Employees Union (OPSEU) for a hearing with respect to a review officer's order dated April 12, 1989. Hearings were held in Toronto on June 21 and 22, 1989.

2. The Applicant alleges that the Respondent, Cybermedix Health Services Ltd. (Cybermedix) has breached sections 6, 13 and 14 of the *Pay Equity Act, 1987* with respect to its duty to negotiate pay equity in good faith.

3. The facts in this case are not in dispute. The parties have been actively negotiating pay equity and disagree on two issues:

   i) What information must be disclosed for the purposes of bargaining pay equity?
   ii) When during the bargaining process must that disclosure be made?

4. Cybermedix operates a series of medical laboratories throughout the province of Ontario and in Montreal. As Cybermedix is a laboratory and therefore in the public sector, it must bargain and complete its pay equity plans on or before January 1, 1990 for its employees throughout Ontario, *Pay Equity Act, 1987* Appendix to Schedule.

5. OPSEU is the bargaining agent for all full time employees of Cybermedix in Metropolitan Toronto except for supervisory, office, and clerical staff. There is a collective agreement between the parties.

6. On February 25, 1988 OPSEU notified Cybermedix that it wished to negotiate pay equity and sought information concerning all employees in the province to assist the union in the bargaining process. The information was requested on several occasions but there was no response. OPSEU then filed a request with Review Services of the Pay Equity Office on August 16, 1988 alleging that the employer had failed to supply the union with information necessary for the union to bargain pay equity.

7. When the parties met with a review officer in September 1988, Cybermedix gave OPSEU the information the union had requested with respect to employees in the bargaining unit. The company did not disclose the information requested for employees outside the bargaining unit.

8. In November, Cybermedix provided the union with a copy of the job comparison system it proposes to use. At a meeting in December, the employer made a presentation of its proposed job comparison system and invited the union to either accept or reject it, to propose modifications, or to table its own job comparison system.

9. The information disclosed showed that OPSEU represents 134 of 529 employees of Cybermedix in the province of Ontario. There are seven different jobs in the bargaining unit; six of those jobs are predominately female, that is 60 per cent or more of these jobs are held by women. There are no predominately male jobs in the bargaining unit. The parties have not yet agreed on the definition and identification of job classes for the workplace.

10. The *Act* requires the comparison of female job classes to male job classes within an establishment, to determine if the work performed is of equal or comparable value. The comparisons are to be made first within the bargaining unit. If there are no male comparators within the bargaining unit, then the female job classes are to be compared to male job classes throughout the establishment, even though the male job comparators will be outside the bargaining unit *Pay Equity Act, 1987* s.6.

11. As there are no male job comparators within this bargaining unit, OPSEU is seeking information about employees outside the bargaining unit. OPSEU has requested the names, job titles, current earnings, gender composition, and existing job descriptions for all positions in the workplace. OPSEU's position is that it is unable to formulate an informed bargaining position about job class and a gender neutral job comparison system appropriate for the workplace without this information. It is the union's position that the disclosure of this information is required from the employer to enable the union to negotiate in good faith and endeavour to agree upon a gender neutral job comparison system and the pay equity plan for the bargaining unit.

12. Cybermedix has agreed that it must provide OPSEU with the job titles and the gender composition for positions outside the bargaining unit and had offered to do so. The company refuses to provide the union with the names of these employees on the grounds that such information is not relevant to bargaining pay equity and that the disclosure of this information would breach the confidentiality owed by the employer to its non-union employees. Finally, Cybermedix refuses to provide the current earnings and job descriptions to the union, as this information is not yet relevant at this stage of the parties' bargaining for pay equity and may never become relevant.

13. The Applicant called Dr. Lois Haignere, an expert witness in job comparison systems and pay equity. Dr. Haignere has been a consultant to employers, to unions, and to joint committees of employers and unions in the pay equity bargaining process both in Canada and in the United States. She testified that in order to meet the requirements of the *Pay Equity Act, 1987* it was necessary to use accurate and complete job information, to use a gender neutral job comparison system appropriate for the particular workplace, and to apply the job comparison system in a gender neutral way. Gender bias can occur in any one of these three areas.

14. Dr. Haignere testified that from her experience job titles are a poor predictor of job content. Sometimes job titles are sex specific: for example, male employees are called "custodians", and female employees are called "housekeepers" or "matrons", even though they do essentially the same work. Position descriptions are often less detailed and more generic for women than for men. "Female jobs" tend to have more members, therefore job specifications must be very general to

cover the range. In contrast, "male jobs" have fewer members and the job descriptions are more detailed. Persons writing job descriptions may leave out important elements of the job. An example would be the omission of nurturing from a care-giving position. In addition, the person delineating the position may incorporate gender bias into the description. For example, the position description for "driver of a small van" said twelve months training required, whereas the training required for "secretary" was only one month. Some job descriptions do not include working conditions. Others include working conditions for the trades, but not for the office staff. Dr. Haignere concluded that the gathering of job information which is gender neutral is an important component of the pay equity process.

15. Dr. Haignere testified that most job comparison systems fall into two types: a priori and policy capturing. An a priori system is one in which factors and weights are selected and predetermined before analysing the content of jobs. Although salary information is not required in order to select an a priori system, normally it is available and used. A policy capturing system is statistically driven and captures or measures the policy that underlines payment for work. Regression and factor analysis are used to establish the factors and weights which form the basis of the current compensation package. These results are not gender neutral. There must be an implementation process in which the policy makers decide how to alter the system to make it gender neutral for pay equity purposes. She concluded that it is essential to have job information and current salaries in order to do policy capturing.

16. Dr. Haignere testified that, no matter which system of job comparison is selected, to assess whether it is gender neutral, two factors must be considered. First, does the system fairly value the job content of both the male and the female jobs? Secondly, is the system consistently applied? In her opinion, it is not acceptable in a service organization to value customer contact at the managerial level but not at the level of operations, especially where those latter employees are hired and evaluated on their contact with customers. Based on Dr. Haignere's experience, it is her opinion that a job comparison system may be gender neutral in one workplace but not in another, depending upon the type of work being performed. It is essential to field test a job comparison system for a workplace. Gender neutrality may be established either after a test run or after all the male and female jobs have been evaluated. Dr. Haignere stated that it is necessary to have the job information of both male and female jobs in order to test gender neutrality.

17. During argument, counsel for the Respondent raised the issue of whether proceedings before the Tribunal were in the nature of an appeal or in the nature of a hearing and to what extent should the Tribunal scrutinize a Review Services order. The *Pay Equity Act, 1987* establishes the Pay Equity Commission and divides it into two separate and independent parts: the Pay Equity Office and the Pay Equity Hearings Tribunal. The *Act* provides that when a matter comes to the Commission, it is sent to the Pay Equity Office and a review officer is assigned who must investigate the matter and may endeavour to effect a settlement. The primary focus of Review Services is to mediate with the parties and to attempt to settle the issues in dispute. This focus is essential in an effective dispute resolution process. The receipt and the evaluation of evidence is not their focus. Although review officers are required to be fair, the more formal requirements of the *Statutory*

Powers Procedures Act R.S.O. 1980, c.484 do not apply *Pay Equity Act, 1987*, s. 34(4). In contrast, section 25 of the *Pay Equity Act, 1987* requires the Tribunal to hold a hearing and to comply with the provisions of the *Statutory Powers Procedure Act*. This proceeding is not an appeal from a review officer's order, but is rather, a hearing *de novo* on the issues in dispute. For example, the only information the Tribunal had about this case from the Pay Equity Office is the order of the review officer. Evidence on issues in dispute must be called at the hearing by the parties and be subject to cross-examination. The Tribunal will assess the credibility of witnesses and determine the weight to be given to the evidence. To turn these proceedings into an appeal of a review officer's order would be contrary to the intent of the statute, would have the negative impact of judicializing the review services process and would take away their primary focus on mediation and settlement. Therefore, these proceedings will be hearings not appeals, and the decisions of the Tribunal will be made based on the evidence presented at the hearing.

18. The purpose of the *Pay Equity Act, 1987* is to redress systemic gender discrimination in compensation. In a unionized setting, the employer and the bargaining agent are required to negotiate in good faith and to endeavour to agree upon a gender neutral job comparison system and the pay equity plan for the bargaining unit (s. 14(2)). They are precluded from bargaining for or agreeing to compensation practices that, if adopted, would contravene the *Pay Equity Act* (s. 7(2)). The Act imposes a joint responsibility on the employer and the union for both the process and the content of pay equity negotiations. Process refers to the duty to negotiate in good faith; content refers to both the gender neutral job comparison system and the component parts of the pay equity plan. A failure to negotiate the component parts might lead to a union rejecting the pay equity plan completed by the employer without union input; a failure to agree to the statutory minimum would leave both parties responsible for their failure to meet their obligations.

19. It is preferable for the parties to negotiate their plan, without resort to the Commission. Success at this depends upon the bargaining agent being a full partner in the process. If the parties are unable to agree, the Pay Equity Commission is available for assistance in order to resolve their dispute. Given the purpose and nature of the *Pay Equity Act, 1987*, the Tribunal will review both the process and the content of negotiations to ensure the obligations established by the *Act* are met.

20. For the parties to negotiate in good faith and endeavour to agree on the job comparison system and the pay equity plan, there must be disclosure of relevant pay equity information. Disclosure is required to foster rational and informed discussions and to enable the parties to move towards settlement. The parties must have sufficient information to intelligently appraise the other's proposals, to formulate their own positions in bargaining pay equity, and to fairly represent their members. The duty to disclose information for the purposes of bargaining collective agreements has been long established *DeVilbiss (Canada) Limited*, [1976] O.L.R.B. Rep. March 49; *Globe Spring & Cushion Co. Ltd.*, [1982] O.L.R.B. Rep. Sept. 1303; *The Windsor Star*, [1983] O.L.R.B. Rep. Dec. 2147; *The Ontario Cancer Treatment and Research Foundation (Thunder Bay Clinic)*, [1985] O.L.R.B. Rep. May 705; *Forintek Canada Corp.*, [1986] O.L.R.B. Rep. Apr. 453; *Royal*

Conservatory of Music , [1985] O.L.R.B. Rep. Nov. 1652. In pay equity negotiations, the parties also will be required to disclose sufficient information to enable informed and rational bargaining to take place. The Respondent acknowledges this obligation, but disputes the extent and timing of that disclosure.

WHAT INFORMATION MUST BE DISCLOSED FOR THE PURPOSE OF BARGAINING PAY EQUITY?

21. The position of counsel for the Respondent was that the duty to disclose is tied to the duty to rationalize a bargaining proposal. She maintained that there is no "in the air freedom of information" just because the Applicant has said that it wishes to talk about an issue or because the information is related to the union's proposal. It was her position that if the employer has tabled a reasonable and rational proposal, then and only then is the employer under an obligation to disclose the information related to the tabled proposal *Royal Conservatory of Music*, supra at pp.38. Cybermedix maintains that there has been no breach of the duty to disclose at this time because the employer has not yet put any of these issues to which this information relates on the bargaining table.

22. It is the Tribunal's decision that not all information requested must be disclosed. The information requested must be necessary to negotiate pay equity. The information must be rationally related to an issue or issues in pay equity bargaining. The information may be necessary to test the quality or impact of a decision in the pay equity bargaining process. Unlike collective bargaining where parties may place a variety of issues on the bargaining table, this *Act* sets the issues to be bargained. Specifically, the parties must bargain and endeavour to agree on the gender neutral job comparison system and on the pay equity plan (s.14(2)). Component parts of a pay equity plan include the establishment to which the plan applies, the male and the female job classes which form the basis of the comparison, a description of the gender neutral job comparison system, the results of the comparisons, the exemptions (if any), the adjustments in compensation, and the dates of the adjustments (s.13). The parties are entitled to information so that rational and informed bargaining on these issues can take place and the parties can move towards a settlement.

WHEN DURING THE BARGAINING PROCESS MUST DISCLOSURE BE MADE?

23. The Respondent's position is that there is a sequential process to the negotiation of pay equity, that is, initial issues such as establishment must be agreed upon before other issues are bargained. The Applicant disagreed with this lock-step approach to pay equity bargaining. In this case, Isla Peters, the pay equity advisor for the Applicant, testified that the union was not prepared to commit itself to sequential bargaining but instead wanted the issues bargained interactively. She said that the Applicant does not want a piecemeal approach to pay equity bargaining. Dr. Haignere testified that there are many paths towards pay equity and that it is not a simple, straight forward process.

24. The Tribunal accepts that the sequential process may assist some parties to bargain pay equity. But, the sequential process is not the only way to bargain pay equity. Neither party can force the timetable of bargaining by refusing to disclose on outstanding issues. The timing of disclosure may depend upon the type of pay equity bargaining in which the parties wish to engage. Disclosure must be made when parties cannot agree on an issue without the information requested. Both parties are entitled to sufficient information to make informed choices at all stages of the process.

25. These parties have been bargaining pay equity since February 1988. It is agreed that there are no male comparators in the bargaining unit and that male comparators must be sought outside the bargaining unit. The Respondent has tabled its proposed job comparison system and has asked the Applicant to either accept or reject it, to propose modifications, or to table its own job comparison system. It is the Applicant's position that pay equity bargaining can go no further without the disclosure of the names, job titles, current earnings, gender composition, and existing job descriptions for all positions outside the bargaining unit. The Applicant states that this information is needed to negotiate the boundaries of job classes both inside and outside the bargaining unit and to identify and evaluate the male job classes which will become the comparators for the female job classes inside the bargaining unit. This information is also needed in order to evaluate the job comparison system tabled by the employer for gender neutrality and to propose its own job comparison system.

26. The Respondent's position is that the parties are a long way from determining job classes and from assessing gender neutrality, and therefore this information is not relevant at this stage of pay equity bargaining. Secondly, the employer's duty to disclose only arises when it must rationalize a bargaining proposal it has tabled. Until the employer proposes a particular male job comparator, there is no obligation to disclose information about this job. Finally, the information sought by the union is about employees outside the bargaining unit and the disclosure of some of the requested information would breach confidentiality.

27. Counsel for the Respondent divided the information requested into three types:

i) the information the Respondent is prepared to disclose, that is, the job titles and gender composition of positions outside the bargaining unit,

ii) information which the Respondent says is not yet relevant at this stage in pay equity bargaining, that is, earnings for each job outside the bargaining unit and the existing job descriptions, and

iii) information which the Respondent is never prepared to release, that is, the names of employees outside the bargaining unit.

28. The Applicant's position is that it must have the earnings for each job outside the bargaining unit in order to be able to identify and evaluate the male job classes which may become the comparators for the female jobs inside the bargaining unit. Secondly, the Applicant seeks the information about current earnings in order to assess the gender neutrality of the job comparison system proposed by the Respondent and to enable the Applicant to propose alternate job comparison systems, which might include a policy capturing system.

29. In this workplace, the male comparators for pay equity must be sought outside the bargaining unit. Therefore, the union is entitled to sufficient information necessary to negotiate the boundaries of job classes both inside and outside the bargaining unit. "Job class" is defined as "those positions in an establishment that have similar duties and responsibilities and require similar qualifications, are filled by similar recruiting procedures and have the same compensation schedule, salary grade or range of salary rates" s.1(1). Therefore, in order to define job class, and to identify and evaluate male job comparators, the Applicant is entitled to the compensation schedule, salary grade, or range of salary rates for all employees outside the bargaining unit. This information is also necessary to allow the Applicant to consider and possibly to propose a policy capturing system of job comparison for this workplace. As both issues of job class and job comparison systems are currently in dispute between these parties, this information must be disclosed by the Respondent to the Applicant forthwith to enable the parties to engage in informed and rational pay equity bargaining.

30. The Applicant seeks the existing job descriptions for jobs outside the bargaining unit as a first step in gathering job information in order to negotiate job classes, to evaluate the job comparison system proposed by the Respondent, and to propose an alternative system. The Respondent opposes this request because these job descriptions, which were prepared by the employer for a purpose different than pay equity, are not always reliable and therefore are not relevant to pay equity negotiations. The Respondent relied upon the evidence of Dr. Haignere that job descriptions are not always accurate; sometimes they are outdated; sometimes they do not accurately reflect the work performed; sometimes they are gender biased; and sometimes they fail to include all of the relevant factors for a gender neutral enquiry. As it is essential to ensure the accuracy of the job information, the parties should be concerned about relying on job descriptions for a pay equity enquiry. While the Tribunal recognizes the potential flaws in the existing job descriptions, they are a starting point in the collection of job information data in this workplace. This information must be disclosed now to enable the Applicant to bargain the current issues of job classes and job comparison systems.

31. Finally, the Applicant seeks the names of employees outside the bargaining unit. The Respondent's position is that these names are not relevant to pay equity bargaining and that their disclosure would breach the confidentiality owed by an employer to its employees. Isla Peters, the pay equity advisor for OPSEU testified that the names were necessary for the Applicant to anchor and verify the other information requested. The Tribunal notes that the Applicant's request for information has been made at a preliminary stage of collecting job information. The Applicant's request for names presumes that there will be problems with the information provided. There is no evidence to establish a basis for this concern. The Tribunal is not prepared at this time to require the Respondent to disclose the names of employees outside the bargaining unit.

32. Based on the agreed facts, the expert evidence presented, and the submissions of the parties, the Tribunal finds that the Respondent must disclose to the Applicant information necessary for the purposes of bargaining pay equity. Failure to disclose this information is a breach of the Respondent's duty to bargain in good faith.

33. The Tribunal varies the order of the review officer dated April 12, 1989 and orders the Respondent, Cybermedix to disclose to the Applicant union forthwith the following information for all positions outside the bargaining unit:

i) the job titles,
ii) the gender composition of the positions,
iii) the compensation schedules, salary grades or range of salary rates for each position, and
iv) the existing job descriptions.

34. This information is necessary to enable the parties to engage in informed and rational pay equity bargaining. There is every indication that the parties will only use this information for the bona fide purpose of negotiating a gender neutral job comparison system and a pay equity plan.

35. The parties are ordered to continue bargaining pay equity.

0001–89 Ontario Nurses Association, Applicant v. Regional Municipality of **Haldimand–Norfolk**, Respondent **(No. 4)**

Before: Janis Sarra, Vice–Chair and Members Sharon Laing and Geri Sheedy.

Appearances: Mary Cornish for the Applicant, Ontario Nurses Association; Paul Wearing for the Respondent, Regional Municipality of Haldimand–Norfolk.

Evidence – Experts

The Applicant Union filed a complaint against the Respondent Employer alleging that the comparison system tabled by the Respondent was not gender neutral. In support of its case, the Applicant sought to introduce expert opinion on a range of issues pertaining to women's work. There was dispute between the parties as to both the qualifications of the witness and the relevance of her proposed evidence.

The Tribunal qualified the witness as an expert and limited the scope of her testimony.

This case is a first look at the issue of the gender neutrality of a proposed pay equity plan. Although it is for the Tribunal ultimately to decide the legal standard of gender neutrality, it can be assisted by expert opinions. In approaching this evidence, the Tribunal must balance: the need for a fair, accessible and expeditious hearing; the need to understand as fully as possible the technical issues involved; and the need to avoid the inherent dangers of too many experts or too much expert evidence which can have the effect of prolonging the proceedings or clouding the issues. The scope and admissibility of such evidence may vary in any given case. The tests for receipt of expert evidence are two–fold. First, has the expert established qualifications in the relevant field? Second, is the evidence sought to be admitted relevant to the issues before the Tribunal and will it be helpful to the Tribunal in the determination of those issues? In qualifying an expert, the Tribunal must satisfy itself that the witness possesses sufficient skill, knowledge or expertise in the area as to be able to appreciably assist the Tribunal. That knowledge or skill can be acquired from study and research; practical training and experience; or from both.

In this case, the Tribunal finds that Dr. Armstrong is an expert on the nature of women in the labour force, and in particular on women's work in the health care sector including nursing work. The Applicant has the right to call evidence directly relevant to the issue of the gender neutrality of the proposals tabled by the Respondent. In calling that evidence, the Applicant can put the issues in a contextual framework in terms of women's work in the health care sector and in the context of the Act. Such evidence is particularly important in the determination of a case where no previous standards of gender neutrality have been decided. The Applicant is not, however, entitled to lead expert evidence that is not helpful or relevant.

Preuves – Experts

Le syndicat requérant a déposé une plainte contre l'employeur, l'intimé, alléguant que le système de comparaison déposé par l'intimé avait un caractère sexiste. Pour appuyer sa cause, le requérant a voulu produire l'opinion d'une personne experte sur un éventail de questions ayant trait au travail des femmes. Les parties ne s'entendaient pas sur les compétences professionnelles du témoin en question ni sur la pertinence du témoignage proposé. Le Tribunal a reconnu le témoin comme témoin expert et restreint l'envergure de son témoignage.

Il s'agit de la première fois que le Tribunal doit examiner le caractère sexiste ou non sexiste d'un projet de programme d'équité salariale. Même si la responsabilité finale d'établir la norme légale du caractère non sexiste d'un programme incombe au Tribunal, celui-ci peut bénéficier de l'aide de témoins experts. Lorsqu'il étudie la possibilité d'entendre de tels témoignages, le Tribunal doit tenir compte de ce qui suit : le besoin de tenir une audience juste, accessible et rapide, le besoin de comprendre le plus possible les questions techniques en cause, et le besoin d'éviter les dangers qui découlent de la présence de trop d'experts ou de trop d'opinions d'experts, ce qui risque de prolonger l'instance ou d'embrouiller les questions. L'envergure et l'admissibilité de tels témoignages peuvent varier d'une affaire à l'autre. Les tests appliqués à la recevabilité d'opinions d'experts sont doubles: 1) L'expert possède-t-il des compétences reconnues dans le domaine en question? 2)Le témoignage que l'on veut faire admettre est-il lié aux questions dont est saisi le Tribunal et aidera-t-il le Tribunal à les trancher? Lorsqu'il reconnaît un expert, le Tribunal doit être convaincu que le témoin possède suffisamment d'expérience, de connaissances ou de compétences dans le domaine en question pour pouvoir véritablement l'aider. Ces connaissances ou compétences peuvent résulter soit d'études et de recherches, soit d'une formation et d'une expérience pratiques, soit des deux.

Dans la présente cause, le Tribunal conclut que le Dr Armstrong est une experte dans le domaine du rôle et de la place des femmes sur le marché du travail et, en particulier, en ce qui concerne le travail des femmes dans le secteur des soins de santé, y compris les soins infirmiers. Le requérant a le droit de solliciter des témoignages directement reliés au caractère sexiste ou non sexiste des projets de programmes déposés par l'intimé. Il peut circonscrire ses questions au contexte suivant : le travail des femmes dans le secteur des soins de santé et le cadre de la Loi. De tels témoignages sont particulièrement utiles pour trancher une cause qui ne fait l'objet d'aucune norme antérieure de non-sexisme. Toutefois, le requérant n'a pas le droit de produire des opinions d'experts qui ne sont ni utiles ni pertinentes.

DECISION OF THE TRIBUNAL, SEPTEMBER 5, 1989:

1. The Applicant Ontario Nurses Association seeks to introduce the expert opinion evidence of Dr. Pat Armstrong to testify on a range of issues pertaining to women's work and gender bias as proposed in the letters which are exhibits 41 and 42. There was considerable dispute between the parties as to both relevance and qualifications of this witness; the process of examination, cross-examination and submissions consumed two days of hearing on August 23 and 24, 1989. In deciding these issues the Tribunal intends to give direction to the parties. We anticipate that this decision will serve to expedite the process.

2. The receipt of expert opinion evidence is not new to administrative tribunals. Even tribunals such as the Pay Equity Hearings Tribunal whose members have a specialized expertise in labour relations and compensation can benefit and draw helpful inferences from the informed opinions of experts in the field. The *Pay Equity Act* requires that a comparison system be gender neutral. This case is a first look at the issue of gender neutrality of a proposed pay equity plan. Although it is for the Tribunal to ultimately decide the legal standard of gender neutrality required by the *Pay Equity Act*, the Tribunal can be assisted by expert opinions. In approaching this evidence, the Tribunal must balance several factors : the need for a fair, accessible and expeditious hearing; the need to understand as fully as possible the technical issues involved; and the need to avoid the inherent dangers of too many experts or too much expert evidence which can have the effect of prolonging the proceedings or clouding the issues. The scope and admissibility of such evidence may vary in any given case. The tests for receipt of expert evidence are two-fold. First, has the expert established qualifications in the relevant field? Second, is the evidence sought to be admitted relevant to the issues before the Tribunal and will it be helpful to the Tribunal in its determination of those issues?

3. In qualifying an expert, the Tribunal must satisfy itself that the witness possesses sufficient skill, knowledge or experience in the area as to be able to appreciably assist the Tribunal. That knowledge or skill can be acquired from study and research; practical training and experience; or from both. It is for the Tribunal to decide whether the witness is to be qualified as an expert in the

proceedings. That expertise in the context of the *Pay Equity Act* need not be strictly related to those working with job evaluation systems; other types of expert evidence could aid our understanding of the issues in dispute. The Tribunal must itself ask if the expertise is relevant and if it is of assistance to the Tribunal.

4. The Tribunal finds that Dr. Pat Armstrong is an expert on the nature of women in the labour force and in particular on women's work in the health care sector including nursing work. Dr. Armstrong has expertise in both the Canadian and Ontario context. We also find that Dr. Armstrong has expertise in critiquing methodologies which capture and analyse women's work. This is evident both in her substantial academic credentials in sociology as well as her research and studies, publication of books, articles in academic texts, refereed journals and other publications.

5. The Applicant seeks to introduce a broad range of expert opinion evidence through this witness. Both parties made extensive submissions on relevance and relied in large measure upon the Tribunal's oral ruling of June 26, 1989. To quote in part:

> The issue before the Tribunal at this point is the allegation by the Applicant Union that the Respondent Employer has failed to negotiate in good faith and endeavour to agree upon a gender neutral comparison system and a pay equity plan for its bargaining units contrary to the *Act* and particularly sections 4, 5, 6(1), 7, 12, 13 and 14. The Applicant alleges that the Respondent has unilaterally adopted and is implementing a gender biased comparison system and pay equity plan contrary to the *Act*.
>
> The only relevant issues before the panel are the issue of good faith bargaining and the issue of the gender neutrality of proposals put forward by the Respondent in this case. Evidence relating to the gender neutrality of the Mercer plan or any other plan is relevant only insofar as it relates to the gender neutral comparison system and the pay equity plan that these parties are required to negotiate under the *Pay Equity Act*.
>
> We have heard that the Respondent intends to lead evidence with respect to the Mercer plan as it has been tabled and negotiated in this case; that evidence is relevant to the determination of the issues before us. Similarly, it is for the Applicant to lead evidence only on those aspects of Mercer or any other plan or comparison system that are relevant to the issues before us. In terms of the evidence that has already been led, it will be for the Tribunal to decide what is relevant to the determination of this case.
>
> In light of the issue being whether the employer in this case has negotiated in good faith and endeavoured to agree upon a gender neutral comparison system and a pay equity plan for these bargaining units, we find that William M. Mercer Ltd. has only a commercial and incidental interest in the proceedings before us. Accordingly, we do not grant intervenor or party status to William M. Mercer Ltd.

That ruling scoped the issues in this case and is helpful in determining the relevance of the evidence the Applicant seeks to introduce through Dr. Armstrong. The issue of gender neutrality of the proposals tabled by the Respondent employer is before the Tribunal. The Applicant has the right to call evidence directly relevant to that issue. In calling that evidence, the Applicant can put the issues in a contextual framework in terms of women's work in the health care sector and in the context of the *Pay Equity Act*. Such evidence is particularly important in the determination of a case where no previous standards of gender neutrality have been decided. Such standards must be decided based upon a thorough canvassing of the issues in this case. However, there is also a need to avoid an excessively lengthy hearing. It is in this context that the Tribunal intends to clarify what will and will not be of assistance to us in the determination of these issues.

6. The Tribunal will receive the evidence of Dr. Armstrong to evaluate the ability of the methodology proposed by the Respondent Municipality to properly capture and reflect the job content of the Applicant's nursing members in these bargaining units.

7. The Tribunal will also receive the evidence of Dr. Armstrong as a sociologist to comment on the possible gender effect of the methodology proposed by the Respondent in this case.

8. The Applicant also seeks to have Dr. Armstrong testify with regard to the following (exhibit #41):

1. Her research Report prepared for the Pay Equity Commission concerning Pay Equity in Predominately Female Establishments: Health Care Sector, September 26, 1988. In particular, she will testify concerning:

    a) the nature of "women's work in the health care sector", specifically the fact that nursing skills are general, complex, overlapping, invisible and unrecognized in large part. She will testify to the fact that classic job descriptions and job evaluation schemes focus on discrete tasks and specific skills that are more likely to be found in male dominated jobs and fail to capture these more general "womanly" skills and the wide ranging, overlapping tasks that characterize much of women's paid and unpaid work. (See Chapter 2 of the above-noted Study).

    b) the profile of Health Care in Ontario and in particular that it is an "hierarchically organized, sex segregated and cast divided health care structure". (See Chapter 3).

    c) her description of the field of registered nursing in Ontario contained at page 35 to 40 of the above-noted Study.

    d) her profile of a Public Health Unit found at page 101 and in particular her findings that Public Health Nurse job descriptions do not capture all aspects of the skills, responsibilities, efforts and working conditions involved in providing care (see page 102 to 103).

    e) her description of the Community Health Program and Health Centres in Ontario found at page 65 to 66.

    f) her conclusions and Critique of current job evaluation schemes as found in Chapter 5 at page 135.

2. Her understanding, knowledge and research in the area of women's work and the devaluation of the skills involved in women's work (for reference see her Curriculum Vitae pages 3-11 which sets out her publications and professional experience).

3. Her research with Hugh Armstrong into the nature of women's work, specifically nursing obtained in a study of a large Metropolitan Hospital in Montreal.

9. The Tribunal will allow Dr. Armstrong to give evidence on the nature of women's work in the health care sector, specifically her view that nursing skills are general, complex, overlapping, invisible and unrecognized, insofar as it forms a basis of the critique of the methodology proposed by the Respondent in this case. With respect to the remainder of paragraphs 1 (a-f), 2 and 3 the

Tribunal does not find it helpful or relevant to receive a comprehensive historical overview as proposed. We do however expect this expert or any expert in this proceeding to rely upon and draw from their studies, knowledge and practical experience in providing a basis of information and expertise upon which to comment upon the gender effects of the methodology proposed by the Respondent in this case.

10. The Applicant also seeks to have Dr. Armstrong review the Mercer comparison system in general and the bargaining history of the parties in this matter. The Tribunal will not allow Dr. Armstrong to comment generally on the Mercer comparison system. As we stated in our June 26, 1989 ruling, the issues before us relate to the gender neutrality of the proposals tabled by the Respondent in this case. The issue of the Mercer comparison system in general is not before us and accordingly the Applicant union will not be allowed to lead this evidence. Finally, with respect to the Applicant's request that Dr. Armstrong review the bargaining history of the parties, the legal standard of negotiating in good faith as required by the *Pay Equity Act* is an issue for the Tribunal to decide. We are not persuaded that Dr. Armstrong's evidence will be of assistance to us in determination of this issue. Accordingly, the Tribunal will not allow Dr. Armstrong to comment on the bargaining history of these parties in this matter.

0008-89 0011-89 Ontario Nurses' Association Applicant v. **Women's College Hospital** Respondent; Women's College Hospital Applicant v. Ontario Nurses' Association Respondent (No. 1)

Before: Raphael Palumbo, Vice-Chair and Members Susan Genge and Sharon Laing

Appearances: Mary Cornish, Lori Newton, Valerie MacDonald and Felicity Briggs for the Applicant, Ontario Nurses' Association; Janice Baker and Patrick Kelly for the Respondent, Women's College Hospital; Anneli LeGault and Don King for the Applicant for Intervenor Status, Stevenson, Kellogg, Ernst & Whinney

Application of Act – Party

The Applicant Union alleged that the Respondent Hospital had failed to bargain in good faith and to endeavour to agree upon a gender neutral comparison system and a pay equity plan contrary to s.14 of the Act. The Hospital counterclaimed against the Union on the same grounds, and the two hearings were consolidated. SKEW, a job evaluation consulting company, applied to intervene claiming that it had an interest in the subject matter of the proceedings. It argued that since the gender neutrality of its plan was at issue in the case, the Tribunal's decision could have an adverse impact upon it in a commercial sense; it might suffer a loss in reputation, revenues and livelihood.

The Tribunal dismissed SKEW's application to intervene as a party.

SKEW is not entitled to intervene as a party pursuant to the provisions of the *Act*. The *Act* provides that certain persons and entities have rights and obligations under the *Act* and it is precisely those persons and entities who are specified as parties in section 32(1). Neither s.25(1) nor s.29(2)(b) enlarges the scope of s.32. Neither is SKEW entitled by law to participate in these proceedings pursuant to s.5 of the *Statutory Powers Procedure Act*, R.S.O. 1980, c.484. The issue in this case is not the gender neutrality of SKEW's plan in general; rather it is the gender neutrality of the Hospital's proposals regarding the comparison system to be used to evaluate the jobs in that particular workplace. It is not SKEW which must meet the requirements of the *Act*; it is the Hospital. In no way will SKEW's legal right to develop and market a job evaluation plan be curtailed by a decision of the Tribunal. SKEW's contractual obligations to the Hospital are not in issue here; if there is a lawsuit, it will be dealt with in another forum. SKEW's interest is collateral to the main issue in these proceedings, and no order of this Tribunal can be directed at it. Finally, not only would the determination of the issues in these proceedings be delayed if SKEW were added as a party, but also the Union would be prejudiced by the prospect of facing a double defence.

PEHT – Hearing – Jurisdiction

A preliminary issue was raised as to whether the Tribunal had jurisdiction to deal with the complaints.

The Tribunal held that it had jurisdiction to deal with the complaints.

The Tribunal finds that it does have jurisdiction to deal with the complaints under s.25(1)(a) of the *Act*. Both preconditions, as set out in *Haldimand-Norfolk* (25 April 1989) 0001-89 (P.E.H.T.) [now reported *Haldimand-Norfolk (No.1)* (1989), 1 P.E.R. 1.] are satisfied in this case.

Practice and Procedure - Pleadings - Application to Strike

A motion was made to strike certain paragraphs of the Hospital's Response on the grounds that it is a request in the nature of separate and independent relief which is not permitted in a response.

The Tribunal reserved on the motion till it heard the evidence and final argument.

Champ d'application de la Loi - Partie

Le syndicat requérant prétendait que l'intimé, l'hôpital, n'avait pas négocié de bonne foi et ne s'était pas efforcé de convenir d'un système non sexiste de comparaison et d'un programme d'équité salariale contrairement à l'article 14 de la Loi. L'hôpital a déposé une demande reconventionnelle à l'encontre du syndicat pour les mêmes motifs et les deux audiences ont été réunies. SKEW, un cabinet d'experts-conseils dans le domaine de l'évaluation des emplois, a déposé une requête en intervention en faisant valoir qu'il avait un intérêt dans l'instance. Il prétendait qu'étant donné que le caractère non sexiste de son programme était en cause, la décision du Tribunal pourrait avoir des conséquences néfastes sur ses affaires. Toujours selon SKEW, la décision du Tribunal pourrait nuire à sa réputation et entraîner une diminution de ses revenus.

Le Tribunal a rejeté la requête en intervention de SKEW.

SKEW n'a pas le droit d'intervenir en qualité de partie en vertu de la Loi. Celle-ci prévoit que certaines personnes et entités possèdent des droits et des obligations en vertu de la Loi et ce sont précisément ces personnes et entités qui sont désignées comme parties au paragraphe 32 (1). Le paragraphe 25 (1) et l'alinéa 29 (2) b) n'étendent pas la portée de ce paragraphe. De plus, SKEW n'a pas autrement le droit de participer à ces instances en vertu de l'article 5 de la Loi sur l'exercice des compétences légales, qui constitue le chapitre 484 des L.R.O. de 1980. Dans la présente cause, le litige ne porte pas sur le caractère sexiste ou non sexiste du programme de SKEW en général mais plutôt sur le caractère sexiste ou non sexiste des propositions de l'hôpital en ce qui concerne le système de comparaison qui doit être utilisé pour évaluer les emplois au sein de ce lieu de travail particulier. SKEW n'est pas tenu de répondre aux exigences de la Loi, mais l'hôpital, oui. Une décision du Tribunal ne peut en aucun cas restreindre le droit de SKEW, reconnu par la loi, d'élaborer et de commercialiser des programmes d'évaluation d'emplois. Les obligations contractuelles de SKEW envers l'hôpital ne sont pas contestées. Toute poursuite éventuelle sera traitée ailleurs. L'intérêt de SKEW est accessoire au point litigieux principal de l'instance et aucune ordonnance du Tribunal ne peut le viser. Finalement, l'établissement des points en litige dans la présente instance serait retardé si SKEW était joint comme partie et le syndicat serait également lésé s'il devait faire face à une double défense.

T.É.S. - Audience - Compétence

Une question préliminaire a été soulevée quant à la question de savoir si le Tribunal avait compétence pour traiter des plaintes. Le Tribunal a statué qu'il avait compétence pour traiter des plaintes.

Le Tribunal conclut qu'il a compétence pour traiter des plaintes déposées en vertu de l'alinéa 25 (1) a) de la Loi. Les deux conditions préalables, telles qu'elles sont énoncées dans Haldimand-Norfolk (25 April 1989) 0001-89 (P.E.H.T.) [citées maintenant dans Haldimand-Norfolk (No.1) (1989), 1 P.E.R.1)] sont respectées.

Pratique et procédure - Actes de procédure - Requête pour rayer certaines dispositions

Une motion a été déposée en vue de rayer certaines dispositions de la défense de l'hôpital pour le motif qu'il s'agit d'une demande de recours séparé et indépendant qui n'est pas permise dans une défense.

Le Tribunal a remis toute décision sur la motion jusqu'à ce qu'il ait entendu la preuve et la plaidoirie finale.

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Batten v. Bay St. George Community College (1986), 59 Nfld. & P.E.I.R. 59 (Nfld. Sup. Ct., T. D.)

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Canadian Labour Congress v. Bhindi (1985), 2 C.P.C. (2d) 28 (B.C.C.A.)

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International Minerals and Chemical Corporation v. Potash Company of America, [1965] S.C.R. 3
Johnson v. Milton (No.1) (1981), 34 O.R. (2d) 289 (Div. Ct.)
Kopyto, R. v. (12 Feb. 1987), (Ont.C.A.) [unreported]
MacCosham Van Lines (Canada) Co. Ltd. v. Minister of Transportation and Communications (1988), 66 O.R. (2d) 198 (Div. Ct.)
Moser v. Marsden (1892), 1 Ch. 487 (C.A.)
Multi-Malls Inc. and Minister of Transporation and Communications, Re (1975), 7 O.R. (2d) 717 (Div. Ct.)
Napev Construction Limited and Vepan Leaseholds Limited, [1976] O.L.R.B. Rep. Mar. 109
Ontario Energy Board, Re (1985), 51 O.R. (2d) 333 (Div. Ct.)
Schofield and Minister of Consumer and Commercial Relations, Re (1980), 112 D.L.R. (3d) 132; 28 O.R. (2d) 764 (Ont. C.A.)
Starr and Township of Puslinch, Re (1976), 12 O.R. (2d) 40 (Div. Ct.)
Westgate v. Sudbury Rand Mines Ltd., [1940] O.W.N. 258 (H.C.J.)

Statutes Referred To

Canada Labour Code, R.S.C. 1970, c.L-1.
Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B of the Canada Act 1982 (U.K.), 1982, c.11.
Customs Act, R.S.C. 1985 (2d Supp.), c.1.
Federal Court Act, R.S.C. 1970 (2d Supp.), c.10, s.28.
Human Rights Code, S.O. 1981, c.53.
Human Rights Code, S.O. 1981, c.53, ss.38, 41.
Labour Relations Act, R.S.O. 1980, c.228, s.1.
Nuclear Liability Act, R.S.C. 1985, c.N-28.
Pay Equity Act, 1987, S.O. 1987, c.34, ss.4, 5, 6, 7, 12, 13, 14, 15, 16, 17, 22, 24, 25, 26, 29, 32.
Public Commercial Vehicles Act, R.S.O. 1980, c.407, s.10b(5).
Statutory Powers Procedure Act, R.S.O. 1980, c.484, s.5.

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Macaulay, R., *Practice and Procedure Before Administrative Tribunals* (Toronto: Carswell, 1988).

DECISION OF THE TRIBUNAL, NOVEMBER 15, 1989:

1. This is an Application by the Ontario Nurses' Association ("ONA") that the Respondent, Women's College Hospital (the "Hospital") has acted contrary to the *Pay Equity Act, 1987*, S.O. 1987, c. 34 (the "Act") and in particular has failed to negotiate in good faith for a gender neutral comparison system and a pay equity plan for its bargaining unit. ONA alleges that the Respondent has breached sections 4(1) and (2), 5, 6(1), 7(1) and (2), and 14(1) and (2) of the *Act*.

2. The Respondent Hospital has also filed an Application alleging that ONA has negotiated in bad faith contrary to section 14(2) of the *Act* in that it has proposed a comparison system which does not meet the requirements of the *Pay Equity Act, 1987*.

3. On September 12 and 13, 1989, the Tribunal heard submissions regarding several preliminary matters. At that time, the two Applications were consolidated pursuant to Rule 12 of the Tribunal's Rules of Practice and they will be heard together.

4. Leave was granted to ONA to amend its statement of Facts and Issues. Paragraph 41.3 of ONA's Statement of Facts and Issues was amended and now reads:

> 41.3 A declaration that the comparison system adopted and proposed by the Respondent Employer is gender biased and unlawful in the circumstances of this case and cannot be the subject of negotiations or agreement;

5. The relief sought by ONA in paragraph 41.4 of its Statement of Facts and Issues was amended so that it now reads:

> 41.4 An Order that the Respondent Employer bargain in good faith with the Applicant Union towards the execution of a gender neutral comparison system and a pay equity plan for the bargaining units. In particular, the parties should be directed to continue to negotiate a pay equity plan using a designed a priori comparison system and utilizing the services of SUNY or HRC as a consultant, such services to be at the expense of the Hospital.

6. The first preliminary matter argued at the hearing on September 12, 1989 was whether the Tribunal had the jurisdiction to deal with the complaints under section 25(1)(a) of the *Pay Equity Act, 1987*. The Tribunal's jurisdiction to consider the complaints depends upon whether there has been a reasonable opportunity for a settlement to be effected at the Review Services stage. Counsel for ONA and the Hospital submitted an Agreed Statement of Facts which outlines the history of the pay equity negotiations between them.

7. Having regard to the factors set out in *Ontario Nurses' Association, Applicant, Regional Municipality of Haldimand-Norfolk, Respondent*, and *Haldimand-Norfolk Regional Board of Commissioners of Police, Other Party*, unreported decision of the Pay Equity Hearings Tribunal, April 25, 1989 [now reported as *Haldimand-Norfolk (No.1)* (1989) 1 P.E.R. 1], for assessing what is a reasonable opportunity for a settlement to be effected, we are satisfied that we have jurisdiction to hear these complaints. It is clear from the Agreed Statement of Facts that the parties met several times before referring the matter to a Review Officer, that the matter was with the Review Officer for four months, and that there was a sufficient opportunity for the Review Officer to effect a settlement. There was neither a settlement effected nor an Order made by the Review Officer pursuant to section 24(3) of the *Pay Equity Act, 1987*. As both preconditions set out in section 25(1)(a) of the *Act* have been met, the Tribunal has jurisdiction to hear the complaints before us.

8. The second preliminary matter raised was an application by ONA to strike paragraphs 28(1), (3), (4), (5), (6), and (7) of the Hospital's Response to ONA's Application. Counsel for ONA submitted that the relief sought by the Hospital in the above-noted paragraphs was in the nature of separate and independent relief which was not permitted in a Response.

9. We are of the view that we ought to proceed to hear the evidence and final argument in the Applications prior to ruling on the motion to strike the above-noted paragraphs in the Hospital's Response and accordingly, we are reserving our decision.

APPLICATION FOR INTERVENTION

10. On September 13, 1989, an application was made by Stevenson, Kellogg, Ernst & Whinney ("SKEW") to be added as a party to these proceedings. Counsel for Stevenson, Kellogg, Ernst & Whinney submitted that the complaint by the Ontario Nurses' Association alleged the following:

1. that Women's College Hospital was bargaining in bad faith, and
2. that the Hospital was proposing to use a job evaluation system that is gender biased, which does not meet the requirements of the *Pay Equity Act, 1987* and which therefore cannot be the subject of bargaining.

11. It is with respect to the second allegation that SKEW wishes to intervene. SKEW wishes to participate in these proceedings as a full party. It wishes to cross–examine ONA's witnesses, lead its own expert evidence and make submissions on fact and law.

12. Extensive argument and review of the relevant case law was made regarding SKEW's application. We propose to consider SKEW's application in light of the following considerations:

1. What are the implications for adding parties raised by section 32(1) of the *Pay Equity Act, 1987*?
2. Is section 32(1) an exclusive list of the parties in light of the structure of the *Act*?
3. Does the Tribunal have the authority to add other parties by virtue of section 5 of the *Statutory Powers Procedure Act*, R.S.O. 1980, c.484?
4. What considerations are relevant to interventions?
5. Should SKEW be granted party status in light of these considerations?

1. THE PAY EQUITY ACT, 1987 AND THE STATUTORY POWER PROCEDURE ACT

13. The initial consideration respecting the Tribunal's authority to add parties involves the interpretation of section 32(1) of the *Act*. Counsel all made extensive submissions, which we summarize here.

SKEW's Position

14. Counsel for SKEW, Ms. Legault, submitted that Section 32(1) of the *Act* essentially ensures that the persons or entities specified must be allowed to participate at a hearing. Those are the persons or entities that are parties as of right. Counsel further submitted that while section 32(1) contains a list of those parties who must be present at a hearing, the list is not exhaustive; thus the Tribunal must apply the common law to determine whether any other person or entity should be a party to the proceedings.

15. Ms. Legault submitted that even though the *Pay Equity Act, 1987* is silent on the issue of whether the Tribunal could add parties, the right to do so is implied where it is necessary to effectively exercise the Tribunal's powers. Counsel referred to Section 25(1) of the *Act* which provides that the Tribunal shall hold hearings in certain circumstances, which implies a requirement that it comply with the duty of fairness and the rules of natural justice. Therefore, it would be contrary to fundamental justice for the Tribunal to proceed with a hearing in the absence of an interested party.

16. Ms. Legault submitted that section 29 of the *Act*, which authorizes the Tribunal to make rules for its procedure gives the Tribunal the right to make rules allowing for persons to be added as parties.

17. In making her argument, Ms. Legault referred to the following case law: *Fishing Vessel Owner's Association of British Columbia et al.* v. *Attorney General of Canada et al.* (1985), 1 C.P.C. (2d) 312 (F.C.A.); and *Director of Investigation and Research under the Combines Act* v. *Newfoundland Telephone Company Limited and Newfoundland Board of Commissioners of Public Utilities*, [1987] 2 S.C.R. 466 (S.C.C.).

The Hospital's Position

18. Counsel for Women's College Hospital, Ms. Baker, submitted that there are three sources for determining who the parties in a proceeding before the Tribunal will be. These are: (1) section 32(1) of the *Pay Equity Act, 1987*; (2) section 5 of the *Statutory Powers Procedure Act*; and (3) sections 25 and 29 of the *Pay Equity Act, 1987*.

19. Ms. Baker submitted that Section 32(1) specifies those parties who have a statutory right to be present at a hearing as full parties and who will be bound by the Tribunal's orders and decisions as outlined in section 26 of the *Act*. The second source for adding parties is section 5 of of the *Statutory Powers Procedure Act*. Counsel argued that that provision allows, or even requires, the Tribunal to give status to persons or entities who are not specified in section 32(1) of the *Pay Equity Act, 1987*, but who are otherwise "entitled by law" to be parties. The third source for adding parties, submitted Ms. Baker, are sections 25 and 29 of the *Act*. Ms. Baker adopted Ms. Legault's arguments concerning these statutory provisions.

ONA's Position

20. Ms. Cornish, counsel for the Ontario Nurses' Association, submitted that Section 5 of the *Statutory Powers Procedure Act* provides that one look to the definition of party in the statute under which proceedings arise. If the statute sets out the parties then that is who the parties to the proceeding are. Counsel submitted that section 32(1) of the *Act* specifies that only employers, objectors, complainants, employees or bargaining agents are parties to proceedings before the Tribunal. Nowhere in the *Act* are consultants or their firms referred to as parties. Since the Legislature has specifically directed its mind to who the parties should be, they therefore did not intend consulting firms to have party status under the *Act*.

Decision of the Tribunal

21. Section 32(1) of the *Act* provides:

> (1) Where a hearing is held before the Hearings Tribunal or where a review officer investigates for the purposes of effecting a settlement of an objection or complaint, the parties to the proceeding are,
>
> (a) the employer;
>
> (b) the objector or complainant; and
>
> (c) the bargaining agent (if the pay equity plan relates to a bargaining unit) or the employees to whom the plan relates (if the plan does not relate to a bargaining unit).

22. In our view, section 32(1) clearly specifies the parties to a proceeding before the Tribunal. They are the employer, the objector or complainant and the bargaining agent (if the pay equity plan relates to a bargaining unit) or the employees to whom the plan relates (if the plan does not relate to a bargaining unit).

23. It is our view that we ought to determine who the parties to a pay equity dispute are on the basis of the objectives, structure and scheme of the *Act*. Section 32(1) of the *Act* mirrors, and is consistent with, other provisions in the statute. That is, the *Act* provides that certain persons and entities have rights and obligations under the *Act* and it is precisely those persons and entities who are specified as parties in section 32(1).

24. The purpose or objective of the *Act* is to redress systemic gender discrimination in compensation for work performed by employees in female job classes. The preamble states that "whereas it is desirable that affirmative action be taken to redress gender discrimination in the compensation of employees employed in female job classes in Ontario" the *Act* was enacted. The Legislature established a structure or scheme by which it believed that this purpose or objective could be achieved.

25. Section 3 provides that the *Act* "applies to all employers in the private sector in Ontario who employ 10 or more employees, all employers in the public sector, the employees of employers to whom this *Act* applies and to their bargaining agents, if any".

26. Section 12 of the *Act* provides that to determine if pay equity exists for each female job class in an establishment, employers must, using a gender neutral comparison system, compare female job classes in each establishment of the employer with male job classes in the same establishment. Clearly, this obligation is reserved for employers to whom the *Act* applies.

27. Section 14 of the *Act* requires that in any establishment in which any of the employees are represented by a bargaining agent, it is the employer and the bargaining agent who are charged with the obligation to negotiate and endeavour to agree on a pay equity plan for the bargaining unit.

28. Section 14(4) provides that where there is agreement on a pay equity plan by an employer and bargaining agent, they must execute the agreement and the employer must post a copy of the plan in the workplace.

29. Where there is no bargaining agent, the responsibility for preparing and posting a pay equity plan is on the employer by virtue of section 15 of the *Act*.

30. Any obligation to increase compensation falls on the employer by virtue of section 13(4) of the *Act*.

31. Sections 15 and 16 of the *Act* provide for objections to pay equity plans which are posted in the workplace and specify who may lodge objections. These include:

1. where the plan relates to a bargaining unit, the employer or bargaining agent (section 16(4)1.); and
2. where the plan does not relate to a bargaining unit, the employee or group of employees to whom the plan applies, other than the objector (section 16(4)2. and 3.).

32. Where there is an objection, the Tribunal shall hold a hearing under section 17, and in its decision, shall settle the pay equity plan to which the objection relates. The right to a hearing is reserved for either an employer, an employee or group of employees, or a bargaining agent since they are the persons or entities that may file notices of objection under section 16(4). It is also clear that a decision by the Tribunal which settles the pay equity plan imposes rights and obligations on these same persons or entities since they are the "parties" to the plan.

33. Under section 22, an employer, employee or group of employees, or the bargaining agent may file a complaint with the Commission complaining that there has been a contravention of the *Act*, the regulations or an order of the Commission.

34. Sections 24 and 25 specify who may bring a matter to the Tribunal, in what circumstances, and limit the potential parties.

35. In outlining the remedies available to the Tribunal, the *Act* contemplates that the Tribunal's orders may both confirm rights and impose obligations on employers, employees or groups of employees, and bargaining agents.

36. In our view, therefore, when one is attempting to determine the scope of section 32(1), it must be done by placing that provision within the context and framework of the entire statute. Section 32(1) is consistent with other provisions of the *Act* in that it names as parties to proceedings before the Tribunal those persons or entities that have been identified as having rights and obligations under the *Act* and who are in the best position to effect the attainment of the statutory objective. We are of the view, therefore, that section 32(1) should be construed so that parties to proceedings before the Tribunal are limited to those persons or entities specified. It is our view that these are the parties which the Legislature contemplated.

37. We have been asked, however, to consider whether we have any other authority by which we may add parties. Counsel for SKEW and the Hospital urge us to do so by virtue of sections 25(1) and 29(2)(b) of the *Act*. Section 25(1) sets out the circumstances under which the Tribunal shall hold a hearing. We are not satisfied that this section enlarges the scope of section 32(1).

38. Section 29(2)(b) provides as follows:

> (2) Without limiting the generality of subsection (1), the Hearings Tribunal,
> (b) may make rules for the conduct and management of its affairs and for the practice and procedure to be observed in matters before it;

39. The questions then are:

1. Does section 29(2)(b) suggest that the Tribunal has the authority to add parties not specified in subsection 32(1)?
2. Are the apparently broad powers in subsection 29(2)(b) restricted by the specific provisions of subsection 32(1)?

40. In our view, section 29(2)(b) does no more than allow the Tribunal to control procedures before it within the context of the legislation. Where the *Act* is specific as to who the parties before the Tribunal are, we cannot agree that a general provision that the Tribunal may control its own procedures overrides the declaration in section 32(1) as to who are the parties in a hearing before the Tribunal.

41. This principle is recognized in the decisions cited by Ms. Legault and Ms. Baker. In the *Fishing Vessels* case, Mr. Justice Addy held at page 319 that every tribunal has the fundamental power to control its own procedure in order to ensure that justice be done. He held, however, that this power is "subject to any limitations or provisions imposed on it by the law generally, by statute, or by the rules of the Court".

42. In the *Newfoundland Telephone Company* case, while the Supreme Court of Canada recognized that a board or tribunal has an implied authority to permit intervention, it held that in appropriate cases there are limits to the scope of the discretion which boards and tribunals can exercise. The Court reviewed the issue of whether the Newfoundland Board of Commissioners of Public Utilities could validly permit the Director of Investigation and Research to intervene in a hearing before the Board when he did not have the required statutory authority to do so. The Court held that the Director did not have the necessary statutory authority to intervene with the permission of the Board, and that the Board could not validly permit his intervention. Mr. Justice LeDain held that there are limits to the implied authority of a board or tribunal to exercise its discretion by admitting intervenors. At page 482, he held that:

> ....Whatever scope may be reasonably assigned to the implied power or discretion of the Board to permit intervention, it cannot have been intended that the Board should have authority to permit intervention by a public officer in his official capacity if the officer has been denied the necessary authority to intervene by his governing statute. The question of whether the officer has the necessary statutory authority, if raised by a party to the proceedings before the Board is, of course, a collateral one on which the Board cannot be expected to pronounce with finality, but it is one which limits the scope of the Board's discretion to permit intervention. To permit intervention where a public officer is shown to lack the necessary authority to intervene would be to permit him to exceed his authority and thus would be contrary to a fundamental principle of public law. There cannot be an implied power to effect such a result.

43. Any discretion to add intervenors through our power to control our procedure must be viewed in light of the *Pay Equity Act, 1987* and Section 32(1) in particular. We are not convinced that section 29(2)(b) alone authorizes the Tribunal to enlarge the list of parties to proceedings before it. If persons or entities other than those specified in section 32(1) may be parties to proceedings before the Tribunal, that finding must be made pursuant to other statutory authority. It is in this light that we now proceed to review section 5 of the *Statutory Powers Procedure Act*, since that legislation applies to the Tribunal.

44. Section 5 of the *Statutory Powers Procedure Act* provides as follows:

> The parties to any proceedings shall be the persons specified as parties by or under the statute under which the proceedings arise or, if not so specified, persons entitled by law to be parties to the proceedings.

45. Unfortunately, the meaning of this provision is not as clear as counsel would suggest. It may mean that anyone specified by the legislation to be a party cannot be denied that status. Furthermore, other persons not specified by the legislation, may be entitled by law to be parties. This is the meaning of section 5 that both Ms. Legault and Ms. Baker would urge upon us.

46. The other possible meaning for section 5 of the *Statutory Powers Procedure Act* is as follows. Anyone specified by the legislation to be a party cannot be denied status as a party. Furthermore, only if the legislation does not specify who are to be parties does the issue of "persons entitled by law" to be parties arise. This is the meaning urged upon us by Ms. Cornish.

47. It is significant that section 5 employs the conjunction "or" before the phrase "if not so specified" rather than the conjunction "and". As a result, the plain meaning of section 5 may be that one looks to the statute under which proceedings arise to determine if parties are specified and if they are that is the end of the search for parties. One only looks for persons entitled by law to be parties once it has been determined that the statute in question does not specify who the parties are.

48. Two decisions were referred to the Tribunal regarding a possible interpretation of section 5 and how it applies to section 32(1) of the *Pay Equity Act, 1987*. In *MacCosham Van Lines (Canada) Co. Ltd.* v. *Minister of Transportation and Communications et al.* (1988), 66 O.R. (2d) 198 (Div.Ct.) the Divisional Court reviewed section 10b(5) of the *Public Commercial Vehicles Act*, R.S.O. 1980, c. 407 which provides that in an application before the Ontario Highway Transport Board for a rewritten certificate "only the applicant and the Minister are parties to a hearing".

49. Mr. Justice Reid, in reviewing section 10b(5) of the *Public Commercial Vehicles Act* held, at pages 211-12 of the decision, as follows:

> I accept that there is a genuinely entrenched principle of administrative law that where natural justice requires it, notice and an opportunity to respond must be given to persons who might be prejudiced by acts done under legislative authority notwithstanding that the legislation does not require it. Thus, it is said, 'the common law will supply the omission of the legislature': *Cooper* v. *Wandsworth Board of Works* (1863), 14 C.B. (N.S.) 180, 143 E.R.414. In that way persons may become parties on the basis that they are 'entitled by law' and that principle is explicitly recognized in s.5 of the *Statutory Powers Procedure Act*. But here there is no legislative omission or oversight. The legislature has not forgotten to provide for persons to be parties; it has stipulated who shall be parties in the clearest of terms. There is thus no basis upon which to apply a principle based on the assumption that the failure to provide for notice to certain persons is an omission.

50. Both Ms. Legault and Ms. Baker submitted that the use of the word "only" to describe who are the parties to the proceedings under section 10b(5) of the *Public Commercial Vehicles Act*, is absolutely critical. They argued that the Board in the *MacCosham* case had absolutely no discretion to add intervenors because the language of section 10b(5) was extremely restrictive. They pointed out that section 32(1) does not contain such restrictive language.

51. With respect, we are not of the view that the use of the phrase "the only parties" in a statutory provision is as significant as counsel suggest. Section 5 makes no distinction between statutes which simply specify who are the parties to proceedings under it and statutes such as the *Public Commercial Vehicles Act* which specifies who "the only parties" are.

52. The decision of Divisional Court in *Re Federation of Women Teachers' Associations of Ontario and Ontario Human Rights Commission et al.* (1988), 67 O.R. (2d), 492 (Div.Ct.) appears to take a different view of section 5 than the *MacCosham* decision. In that case, the Divisional Court was dealing with an application by the Federation of Women Teachers' Associations of Ontario (FWTAO) for judicial review of the decision of the Ontario Human Rights Commission to request the Minister to appoint a board of inquiry with respect to the complaints of two female teachers. The complaints dealt with the provisions of a certain by-law of the Ontario Teachers' Federation, a statutory body composed of five teachers' affiliate organizations. FWTAO is one of the affiliates. One of the applicant's grounds for judicial review was that it was denied party status in the processing of the complaints under the *Human Rights Code*, S.O. 1981, c.53.

53. The Divisional Court noted that the board of inquiry granted FWTAO intervenor status with all the rights of a party to make its case before the board. The Court held that regardless of whether FWTAO was granted that status pursuant to section 38(2)(d) of the Code which specified parties before the board, or section 5 of the *Statutory Powers Procedure Act*, its rights of appeal under section 41 of the Code were preserved.

54. By simply stating, without any further comment, that FWTAO was given intervenor status with full rights of a party by the board of inquiry, it may be that the Divisional Court was taking the view of section 5 urged upon us by Ms. Legault and Ms. Baker. It is difficult to determine what view the Divisional Court was taking of section 5 since the meaning to be given to that clause was not before it to be decided. Therefore this decision is not helpful to our deliberations.

55. In our view, if the *MacCosham* decision is the law in Ontario then we need not look any further than section 32(1) of the *Pay Equity Act, 1987*. Since the *Act* specifies who the parties before the Tribunal are, we need not be concerned with whether there are any persons outside of those specified in section 32(1) who are entitled by law to be parties in proceedings before us. On the basis of this interpretation then, since SKEW is not in any of the categories provided for in section 32(1), it cannot be a party to these proceedings.

56. If, on the other hand, the principles with respect to section 5 of the *Statutory Powers Procedure Act* enunciated in the *MacCosham* decision are *not* the law in Ontario then we must endeavour to determine whether SKEW is entitled by law to be a party to these proceedings.

2. *INTERVENTION AS A PARTY*

SKEW's Position

57. Ms. Legault submits that in order to determine whether SKEW should be added as a party, three factors must be considered. Firstly, does SKEW have an interest in the subject matter of the case? Secondly, does SKEW have the potential to be adversely affected by the outcome of this particular case? Thirdly, is SKEW in a position to provide assistance and to ensure that all the relevant facts are put before the Tribunal?

58. Ms. Legault submitted that the Aiken Plan (the "Plan") is the job evaluation system provided by SKEW and that the essence of the complaint by ONA is an attack on the gender neutrality of that Plan. Therefore a major portion of the dispute is between ONA and SKEW rather than ONA and the Hospital.

59. Ms. Legault argued that SKEW has the potential of being adversely affected by the outcome of this particular case in that an adverse decision by the Tribunal would have a substantial impact on SKEW in terms of revenues, livelihood, reputation and its professional activities in general. Counsel indicated that a decision could also have a direct impact on SKEW's contractual relationship with the Hospital. It might open the possibility that SKEW could be sued by the Hospital or be forced to re-negotiate its contract.

60. Counsel also submitted that an adverse decision by the Tribunal would have an impact on SKEW's relations with the Ontario Hospital Association, which originally heard the bids from the various consultants and selected the Aiken Plan for use in the hospitals of Ontario.

61. Ms. Legault argued that SKEW can be of assistance to the Tribunal in that it can ensure that the Tribunal fully understands the issues. She contends that this factor is especially relevant where the issue relates to a complex and specialized question, such as the gender-neutrality of a job evaluation system. Counsel submitted that SKEW was not seeking status as a friend of the Tribunal in that it has an interest in the matter before the Tribunal.

62. In Ms. Legault's submission, it is not an absolute rule that an applicant for intervenor status must show that it has a direct interest in the proceedings. She submitted that it is enough if the decision in question will directly affect a person's legal rights or in his or her pocket book; if one has a legitimate and substantial interest; if there is a commercial interest or a probable loss in livelihood. She also argued that a reasonable possibility that an interest may be affected is enough to obtain party status. She submitted that one should normally be a party to proceedings if one's rights could be directly affected by the acts of a court or administrative tribunal.

63. Finally, Ms. Legault submitted that if SKEW was added as a party intervenor, it could ensure that the issues arising out of the Aiken Plan would be dealt with and that further complaints by ONA against other hospitals could be avoided with respect to those issues.

64. Ms. Legault then reviewed the case law which included *International Minerals and Chemical Corporation and Potash Company of America and DuVal Potash and Sulphur Company and The Commissioner of Patents*, [1965] S.C.R. 3 (S.C.C.); *Re Starr and Township of Puslinch* (1976), 12 O.R. (2d) 40 (Div.Ct.); *Re Multi-Malls Inc. et al. and Minister of Transportation and Communications et al.* (1975), 7 O.R. (2d) 717 (Div.Ct.); *Re Damien and the Ontario Human Rights Commission* (1976), 12 O.R. (2d) 262 (Div.Ct.); *Johnson et al.* v. *Corporation of Town of Milton (No.1)* (1981), 34 O.R. (2d) 289 (Div.Ct.); *Friction Division Products* v. *E.I. DuPont de Nemours and Co. Inc. et al.* (1985), 51 O.R. (2d) 244 (Div.Ct.); *Fishing Vessel Owners'*

Association of British Columbia et.al. v. *Attorney General of Canada et al., supra*; and *The Canadian Transit Company and The Public Service Staff Relations Board, Treasury Board, Carlo Bargotto, Ron Lauzon, and Larry Macko*, unreported decision of the Federal Court of Appeal dated June 13, 1989.

The Hospital's Position

65. Ms. Baker submitted that SKEW ought to be added as a party on the basis that, as the marketer of the Plan, it has a legitimate and vital interest in the outcome of this hearing. She submitted that SKEW is an organization whose plan is being directly attacked by ONA.

66. Counsel submitted that SKEW stands to be potentially aggrieved if a decision regarding the gender neutrality of the Plan is made in favour of ONA. Therefore, SKEW has a personal, commercial interest in the outcome of this decision. SKEW is facing potentially serious commercial and business consequences and, by implication, the decision, if made in the form requested by ONA, would challenge their competence and professionalism. Ms. Baker argued that SKEW is not a mere "busy body", nor is it trying to raise new issues or create a new cause of action.

67. Ms. Baker adopted SKEW's submissions regarding the assistance it could provide to the Tribunal.

68. Ms. Baker referred the Tribunal to the following decisions: *Gryd Construction Inc., The Manufacturers Life Insurance Company and Local 562, Wood, Fire, and Metal Lathers International Union*, [1975] O.L.R.B. Rep. March, 230; *R.v.Kopyto*, unreported decision of the Ontario Court of Appeal dated February 12, 1987; *Re Association of Parents for Fairness in Education, Grand Falls District 50 Branch and Société Des Acadiens Due Nouveau-Brunswick Inc. et al.* (1984), 8 D.L.R. (4th) 238; *Batten and Newfoundland Association of Public Employees* v. *Bay St. George Community College* (1986), Nfld. - P.E.I.R. 59 (Nfld.Sup.Ct., Trial Division); *Re Ontario Energy Board* (1985), 51 O.R. (2d) 333 (Div.Ct.); *Re Regional Municipality of Hamilton-Wentworth and Hamilton-Wentworth Save the Valley Committee Inc. et al.* (1985), 51 O.R. (2d) 23 (Div.Ct.); and *Energy Probe et al., Intervenors* (1989), 68 O.R. (2d) 449 (O.C.A.).

ONA's Position

69. Ms. Cornish submitted that its complaint is not an inquiry into the nature of comparison systems or the Aiken Plan generally. ONA's position is that its criticisms of the Plan relate to the comparison system proposed by the employer and whether it is gender neutral when applied to this particular workplace.

70. Secondly, Ms. Cornish submitted that SKEW has only a commercial and incidental interest and that is not sufficient in this case because that interest is not protected by the *Pay Equity Act, 1987*.

71. Ms. Cornish also dealt with the issue of whether SKEW could be of assistance to the Tribunal. Counsel submitted that the employer ought to be able to defend whether or not the system is gender neutral. In her view, it is an unacceptable argument to state that SKEW ought to be an independent party because it knows more about the Aiken Plan than does Women's College Hospital.

Decision of the Tribunal

72. In order to determine whether SKEW ought to be added as a party to these proceedings, the Tribunal proposes to consider the following:

(i) What is the nature of proceedings before the Tribunal?

(ii) What are the issues in this particular case?

(iii) What is the nature and scope of the proposed intervenor's concern in these proceedings?

(iv) Is the proposed intervenor requesting status as a friend of the Tribunal? Will the intervenor bring to the proceeding an expertise concerning the policy, factual or legal issues in dispute which is different than that of the parties?

(v) Are there other mechanisms for dealing with the intervenor's concerns such as the filing of independent complaints, consolidation of hearings, or appearing as a witness for one of the parties?

(vi) What prejudice will there be to the parties if the intervenor is permitted to participate in the proceedings as a party?

  a) Will the intervention widen the issues in dispute?

  b) Will the intervention delay an expeditious determination of the dispute?

  c) Will the intervention unreasonably add to the cost of the proceedings for the parties?

What is the nature of proceedings before the Tribunal?

73. Many of the cases referred to the Tribunal involve broad public interest issues, regulatory tasks, or constitutional questions. As Robert Macaulay points out in his text *Practice and Procedure Before Administrative Tribunals*, the public interest cases involve, for example, the price of natural gas, the location of highways, pipelines, transmission towers, or the granting of radio licences. In most public interest cases, the issues are wide and far-reaching and compel the adjudicator to consider the interests of a community or the public at large.

74. In the decision of the Court of Appeal in *Energy Probe et al.* v. *Attorney General of Canada; Ontario Hydro et al., Intervenors*, the issue before the court was whether various provisions of the *Nuclear Liability Act*, R.S.C. 1985, C.N-28 were unconstitutional on the grounds that they were *ultra vires* the Parliament of Canada as legislation with respect to property and civil rights and that they violated various provisions of the *Charter of Rights and Freedoms*.

75. In *Canadian Labour Congress* v. *Bhindi et al.* (1985), 2 C.P.C.(2d) 28(B.C.C.A.), the applicant Canadian Labour Congress was allowed to intervene as an added party with respect to the constitutional issues raised. Intervenor status was granted for a number of reasons including the fact that the case involved a matter of national concern in the field of labour law. As well, the Court held that in cases dealing with Charter issues, it ought to hear from all segments of the community.

76. These cases point out that the more a decision of a board or tribunal involves public policy or constitutional matters the less important the potential intervenor's personal interest will be and the more relevant their ability to provide the board or tribunal with helpful information. Conversely, the more a determination lies within the realm of a private dispute, the more directly connected to the actual lis between the parties the potential intervenor's interest ought to be.

77. A review of the *Pay Equity Act, 1987* reveals that the disputes which the Tribunal will be considering are more in the nature of *lis inter partes*. The statute requires that the Tribunal adjudicate upon matters arising from the preparation and negotiation of a pay equity plan. It also requires, in certain cases, that we determine whether the *Act* has been breached by one of the parties identified in the *Act* as a participant in the pay equity process. Furthermore, the remedies provided under section 25(2) are such that they involve a resolution of particular disputes between particular parties. This being the case, we are of the view that the level of intervention permitted would not be substantial.

What are the issues in this particular case?

78. The definition of the issues before us are in dispute, as outlined earlier. ONA submits that the focus of its complaint regarding the gender neutrality of the proposals put forward by the Hospital will be on the particular workplace in question. SKEW maintains that the Aiken Plan, rather than its application in this workplace, has been directly placed in issue by ONA.

79. It is significant that the term "gender neutral comparison system" is employed in section 14 of the *Act* and not the phrase "job evaluation plan". Section 14(1) obligates the employer and the bargaining agent to *negotiate* a "gender neutral comparison system". The focus of section 14(2)(a) is not on any specific job evaluation plan but in fact on a gender neutral comparison system which must be agreed to by the parties.

80. The developers, suppliers, or marketers of job evaluation plans are neither mentioned nor in any way given any status under section 14 regarding the negotiations that must take place; although the reality appears to be that job evaluation plans may be utilized as the basis for bargaining proposals under this section. Nevertheless, the obligation to agree upon a gender neutral comparison system in a unionized workplace is on the employer and the bargaining agent. The developer or supplier of a job evaluation plan is incidental to the process outlined in section 14(2) of the *Act*.

81. In our view, therefore, the issue before the Tribunal in this case is the gender neutrality of the proposals put forward by the Hospital regarding the comparison system to be used to evaluate the jobs in that particular workplace. The issue is not the gender neutrality of the Aiken Plan. We are guided by the Ruling of the Tribunal in the *Haldimand-Norfolk* case dated June 26, 1989. In that case, William M. Mercer Ltd. requested intervenor status in the proceedings. At paragraphs 3 and 4 the Tribunal decided as follows:

> 3. The only relevant issues before the panel are the issue of good faith bargaining and the issue of the gender neutrality of proposals put forward by the Respondent in this case. Evidence relating to the gender neutrality of the Mercer plan or any other plan is

> relevant only insofar as it relates to the gender neutral comparison system and the pay equity plan that these parties are required to negotiate under the *Pay Equity Act*.
>
> 4. We have heard that the Respondent intends to lead evidence with respect to the Mercer plan as it has been tabled and negotiated in this case; that evidence is relevant to the determination of the issues before us. Similarly, it is for the Applicant to lead evidence only on those aspects of Mercer or any other plan or comparison system that are relevant to the issues before us. In terms of the evidence that has already been led, it will be for the Tribunal to decide what is relevant to the determination of this case.

What is the nature and scope of the proposed intervenor's concern in these proceedings?

82. SKEW's position is that it has an interest in the subject matter of the proceedings, and that the Tribunal's decision may have an adverse impact on SKEW in a commercial sense; it may suffer a loss in reputation, revenues and livelihood.

83. In argument regarding the nature of the interest necessary to justify intervention, the Tribunal was referred to several decisions of the Divisional Court. In *Re Starr and the Township of Puslinch*, purchasers of land designated as a gravel pit under an official plan sought intervenor status in an application for judicial review of the official plan of the Township of Puslinch. Grange, J. held that the applicants for intervenor status had a considerable commercial interest in the result of the judicial review application, because if the application was successful they would have been faced with the problem of a rezoning application, an amendment to the official plan and all of the consequent difficulties that might arise therefrom.

84. Grange, J. held that the question before him involved the determination of whether Rule 136 of the Rules of Civil Procedure contemplated or permitted the addition of parties to the proceedings in the circumstances of this case. At page 43 of the decision he held that:

> The determination of the question depends upon the Court's interpretation of the Rule. It is clear that upon one interpretation no person who is not directly concerned in the issue to be litigated can be added. It is equally clear that under another interpretation any person whose rights are directly and substantially affected by the result of the litigation is a person 'whose presence is necessary to enable the court effectually and completely to adjudicate upon the questions involved in the action'.

85. After reviewing the authorities Mr. Justice Grange held that there was "no absolute rule that for a party to be added he must have a direct interest in the very issue to be determined". He cited the decision of Lord Denning, M.R., in *Gurtner* v. *Circuit et al.*, [1968] 2 Q.B. 587, which stood for the proposition that it was enough for a person to be added as an intervenor if "the determination of [the] dispute [would] directly affect a third person in his legal rights or in his pocket, in that he will be bound to foot the bill". Because the intervenors would be affected by the determination of the judicial review, Grange, J. allowed them to be added as parties.

86. It is clear that the decision in *Re Starr* was based on the Court's interpretation of Rule 136. Clearly, the Court determined that because the rights of the proposed intervenors would be directly and substantially affected by the result of the litigation, they were persons "whose presence [was] necessary in order to enable the court effectually and completely to adjudicate upon the questions involved in the action". In other words, without the presence of the proposed intervenors, the Court could not make a proper determination of the issues in dispute.

87. In deciding the issue before the Tribunal, the provisions of former Rule 136 are inapplicable. While the Divisional Court was required to satisfy itself that the intervention was justified under Rule 136, we must apply other considerations more closely related to the statutory framework under which we operate. Nevertheless, even if we were to apply the reasoning underlying the decision in *Re Starr*, we are not convinced that that would afford SKEW the status it seeks. The question under the *Re Starr* reasoning is whether SKEW's presence is necessary for the Tribunal to effectually and completely adjudicate upon the question in dispute because its rights are directly and substantially affected by the result of the litigation before the Tribunal.

88. What ONA has requested of the Tribunal is "a declaration that the comparison system adopted and proposed by the Respondent Employer is gender biased and unlawful in the circumstances of this case and cannot be the subject of negotiations or agreement". Under the *Pay Equity Act, 1987* it is employers, unions and employees who must comply with its terms. Therefore, where a union alleges that an employer has breached the *Act* by proposing a comparison system which is gender biased, it is the employer who must reply to the allegation and whose presence is necessary for the Tribunal to adjudicate upon the issue. In its Response it can adduce whatever relevant evidence it wishes to meet the allegation, including evidence from the developer or marketer of the job evaluation plan upon which the employer's comparison system is founded.

89. In *Re Multi-Malls Inc. et al. and Minister of Transportation and Communications et al.*, the applicants brought an application for judicial review of certain land use decisions made by the Minister of Transportation and Communications which were adverse to them. They had planned to build a shopping centre adjacent to the Town of Tillsonburg. The Town wished to be added as a party to the judicial review application since it had a scheme for urban renewal which was inconsistent with the building of a large shopping centre on its immediate borders. The Divisional Court held that the Town of Tillsonburg and its ratepayers had a "vital and legitimate" interest in the matter in dispute and it was therefore added as a party to the judicial review proceedings.

90. The issues in this case appear to be much wider than a classic *lis inter partes*. Clearly, the issue was not restricted to a consideration of whether the applicants would be able to build a shopping centre. Rather, the case involved the actions of the Minister, the validity of the official plan in question, and the effect of the applicants' proposals on the scheme for urban renewal which the Town of Tillsonburg had developed. The Court recognized this at page 719 of its decision when it held that:

> This matter seems to raise matters of some importance involving ministerial powers in such matters and as to planning jurisdiction.

It is not surprising therefore, that the Court wished to have the views of the Town of Tillsonburg heard at the judicial review.

91. The case before us does not involve a matter of public interest. Because of the fundamental difference in the nature of the inquiry in the *Multi-Mall* case, the principles enunciated there are not determinative of the issues before us.

92. In *Re Damien and Ontario Human Rights Commission* the Divisional Court held at page 263 that "a party whose rights will be directly affected by the acts of a Court or administrative body should normally be a party to the proceedings contemplated". In this case, the issue was whether or not the Ontario Human Rights Commission should receive and deal with a complaint that the applicant had been dismissed from his employment at the Ontario Racing Commission because he was a homosexual. The Human Rights Commission held that it did not have the jurisdiction to investigate the complaint.

93. Mr. Damien made an application to Divisional Court for judicial review. The Court allowed the applicant's employer to intervene in the matter. However, the grounds upon which the Court allowed the intervention are interesting. As page 264 of his decision, Osler, J. held that the connection of the Racing Commission with the issue that may be before the Ontario Human Rights Commission:

> ....is sufficiently direct that the Racing Commission should be given the opportunity to argue the question of jurisdiction itself. If that were not so, and if we were to decide that the Human Rights Commission is obligated to investigate this complaint and does have jurisdiction and an investigation were to proceed, the Racing Commission would at that stage be foreclosed of any right to argue the jurisdictional question. We feel that this cannot be right...

94. Clearly there was a direct link between what the Ontario Human Rights Commission was to decide and the employer, the Ontario Racing Commission. If the Human Rights Commission decided that the applicant was fired for improper reasons, the Racing Commission would be directly affected in that it might be required to re-instate the applicant. Since the Human Rights Commission might name the employer in the remedy, it was imperative that the employer be allowed to argue whether or not the Human Rights Commission even had the jurisdiction to consider the complaint.

95. In our view, there is no similar direct affect on SKEW in these proceedings. Any remedy related to the comparison system proposed by the employer will be directed to the employer and not to SKEW.

96. In *Friction Division Products, Inc.* v. *E.I. DuPont de Nemours & Co. Inc. et al.*, Barr J. held at page 246 of his decision that:

> The present application has been brought by Friction Division Products, Inc., the plaintiff in the Delaware litigation. The respondents are E.I. DuPont, the two Canadian companies and their executives. At the beginning of the hearing an application was made by DuPont Canada Inc. for leave to intervene as an added party. The evidence showed that the Canadian company has legitimate commercial interests which may be adversely affected by my decision. I accordingly granted the application under rule 13.01(1).

97. Unfortunately, Barr, J. did not discuss what the "legitimate commercial interests" were, nor did he explain why those commercial interests were sufficient to afford intervention status.

98. When one reviews the facts in this case, however, one notes that what was at stake was not so much a commercial interest but the legal right of DuPont Canada Inc. to purchase Kelvar Pulp and Fibre from E.I. DuPont de Nemours & Co. Inc. and re-sell it to companies located in Canada. In other words, it is a question of DuPont Canada's right to carry on a part of its business. As Barr, J. stated at page 246:

> It appears that DuPont Canada purchased Kelvar Pulp and Fibre from E.I. DuPont and resold it to a number of Canadian users including the Canadian respondents. The goods were ordered, delivered, and paid for in Canada. These sales were entirely between three Canadian companies - DuPont Canada and the two Canadian respondents.

99. The litigation involved a patent action arising in the United States between Friction Division Products and E.I. DuPont over the patent to Kelvar Pulp and Fibre. It appeared that if Friction Division Products was successful in the patent action, E.I. DuPont would no longer be able to sell the products to its Canadian subsidiary DuPont Canada. DuPont Canada in turn, would not be able to resell the products to its Canadian customers. The Court decided that the effect of a decision in favour of Friction Divisions Products might directly affect DuPont Canada's legal rights to carry on its pulp and fibre business.

100. In the *International Minerals* case, the litigation again concerned a patent action. As Cartwright, J. held at page 11 of this decision:

> The order for which DuVal is asking in the action is that it be declared that it is entitled to the issue of a patent which, if granted, will confer upon it the exclusive right of using the flotation process which PCA has been using for years and proposes to use in the development of its deposits of potash ores in Saskatchewan. *The order sought would, in my opinion, affect the legal right of PCA to continue to carry on its business.* [Emphasis Added]

101. Again, the issue in the case was the legal right of a company to carry on its business enterprise should there be an adverse decision in an action to which it was not made a party.

102. In the *Fishing Vessels* case, the Federal Court of Appeal dealt with the issue of whether gill net fishermen ought to be allowed to intervene in an action between an association of seiner fishermen and the Federal Development of Fisheries. The Department had allowed the gill net fishermen to fish for salmon two days longer than the seiners during the approved fishing season. The seiners obtained an injunction against the Department prohibiting it from implementing the fishing plan described above.

103. Addy, J. found that the gill net fishermen had "a real and inviolable right to fish during the season and in accordance with the annual fishing plan of the Department of Fisheries as long as they comply with its rules and regulations". Addy, J. also held that "the exercise of that right involves a considerable financial return during the limited fishing season. Conversely, the loss of two days' fishing can involve a considerable financial loss". He held that there was "no greater pecuniary interest or right than an interest in one's own livelihood". At page 316, he also held that:

> I do not subscribe to the view that the interest of the person seeking to be joined has to be limited to a proprietary right in tangible property. A probable loss or diminution of one's livelihood constitutes a real, existing, enforceable legal right and interest.

104. While this decision appears to stand for the proposition that if a decision in a proceeding in which a person is not a party may affect that person's livelihood then that person has an interest which will permit him or her to obtain intervenor status in the proceeding. In our view, this decision does not go that far. It was clear that the Federal Court was concerned about not merely the reduction in revenues or the diminution of livelihood, but the right of the gill net fishermen to carry on their business. In other words, it was not simply a matter of determining that the gill net fishermen might suffer some financial loss if a permanent injunction against the Department would be awarded. Rather, the Court was concerned about the right of the gill net fishermen to carry on fishing at all. At page 319 of the decision, Addy, J. held that the gill net fishermen ought to be allowed to intervene in the appeal of the interlocutory injunction brought by the Department of Fisheries. He based his decision, among other reasons, on "the fundamental right of every citizen to derive his livelihood from the natural resources of our country, subject to whatever reasonable controls may be imposed for the good of all...."

105. In our view, therefore, it was the possible curtailment of the right to fish according to the Department's fishing plan that was determinative of the decision to allow them to intervene as a party in the appeal rather than a simple loss of revenues.

106. It appears that in the *Re Starr* decision weight was also placed on the fact that the business of the applicant intervenors might be jeopardized by an adverse decision in the action. At page 46 of his decision, Grange, J. held that:

> ...I do believe that in this instance, where the very enterprise of the applicants will be in danger of prohibition and where both applicants appear to have acted in reliance on the official plan that is now attacked, they should be permitted to intervene.

107. In our view, there is no evidence that SKEW's enterprise will be "in danger of prohibition" by any decision of the Tribunal. While it is true that if the Tribunal finds that the comparison system proposed by Women's College Hospital is gender biased, then we may order that it be amended in some manner. This order, however, will be directed to Women's College Hospital and not to SKEW. In no way will SKEW's legal right to develop and market a job evaluation plan be curtailed.

108. In the *Canadian Transit Company* case, the owner of the Ambassador Bridge, was statutorily liable under the *Customs Act*, R.S.C. 1985, (2nd SUPP.), c. 1, to pay the expenses of any repair or construction to the bridge if it was found not to meet the requirements of Part IV of the *Canada Labour Code*, R.S.C. 1970, c. L-1.

109. In that case, the Federal Court of Appeal held that the owner of the bridge had a very real legal interest in the outcome of the proceedings. MacGuigan, J. held, at page 10 of his decision, that:

> In my view this real interest of the applicant was in a sufficiently direct relationship to the subject matter before the Board that the applicant was entitled to notice of the hearing on December 21 and an adequate opportunity to present its case.

110. Can it be said that SKEW is subject to similar liability if the Tribunal makes an order against Women's College Hospital regarding its proposals for a comparison system? We think not. As noted earlier, it is not SKEW which must meet the requirements of the *Act*; it is the Hospital. If there is any liability for SKEW at all in these circumstances it is not as a result of the *Act* but rather, as Ms. Legault has pointed out, as a result of the contractual relationship between the Hospital and SKEW.

111. In our view, this is a consideration which the Tribunal ought not to take into account in deciding whether to permit SKEW to intervene in these proceedings. We have no knowledge of any of the contractual obligations which SKEW may have with either Women's College Hospital or the Ontario Hospital Association. Nor do we believe that we ought to speculate as to what those obligations might be.

112. Secondly, SKEW's contractual obligations to the Hospital or to the Ontario Hospital Association are simply not in issue in these proceedings. We are charged with responsibility of scrutinizing whether the Hospital and ONA have met their obligations under the *Pay Equity Act, 1987* not with affording SKEW the opportunity of defending itself so as to avoid a lawsuit in the future. If there is a lawsuit that will be dealt with in another forum.

113. Mr. Justice Marceau dealt with this issue in his decision in the *Canadian Transit Company* case. While the Federal Court is bound by section 28 of the *Federal Court Act*, R.S.C. 1970 (2nd SUPP.), c. 10, which requires a direct effect on the proposed intervenor before intervention will be permitted, nevertheless his analysis is extremely helpful. While he concurred with the decision of MacGuigan, J.A. that the owner of the bridge ought to have been given an opportunity to be heard, he held at page 2 of his decision that:

> It is clear to me that mere interest in the eventual outcome of a proceeding before a tribunal, whether financial or otherwise, is not in itself sufficient to give an individual a right to participate therein. The demands of natural justice and procedural fairness certainly do not require so much and in any event it would be impossible in practice to go that far. In my judgment, to be among the interested parties that a tribunal ought to involve in a proceeding before it to satisfy the requirements of the *audi alteram partem* principle, an individual must be directly and necessarily affected by the decision to be made. His interest must not be merely indirect or contingent, as it is when the decision may reach him only through an intermediate conduit alien to the preoccupation of the tribunal, such as a contractual relationship with one of the parties immediately involved.

114. In *Crown Trust Co. et al.* v. *Rosenberg et al.* (1986), 22 C.P.C. (2d) 115 (H.C.J.) Clarkson Gordon Inc., the Interim Receiver and Manager, brought a motion to approve the sale of certain properties. There were many properties for sale, and many offers were received and considered by the Receiver. Twenty-six offers were recommended by the Receiver for approval by the Court.

115. An offer by Larco Enterprises Ltd. was received by the Receiver but was not recommended for approval. Upon the return of the Receiver's motion, Larco brought a motion to be added as an intervenor in the action and allowing it access to the Receiver's report as to the proposed purchase of the properties set out.

116. In dismissing Larco's application Anderson, J. first reviewed whether the applicant had an interest in the subject matter of the proceeding. At page 121 of his decision Anderson, J. held that:

> The motion brought by Clarkson to approve the sales is one upon which the fundamental question for consideration is whether that approval is in the best interests of the parties to the action as being the approval of sales which will be most beneficial to them. In that fundamental question, Larco has no interest at all. Its only interest is in seeking to have its offer accepted with whatever advantages will accrue to it as a result. That interest is purely incidental and collateral to the central issue in the substantive motion and, in my view, would not justify our exercise of the discretion given by the Rule.

117. Anderson, J. then reviewed the issue of whether Larco would be adversely affected by a judgment in the proceeding. He held at page 121 that:

> ....In my view, Larco, will not be adversely affected in respect of any legal or proprietary right. It has no such right to be adversely affected. The most it will lose as a result of an order approving the sales as recommended, thereby excluding it, is a potential economic advantage only.

118. To borrow the analysis of Anderson, J., in our view that the fundamental issue to be decided is whether or not the comparison system proposed by Women's College Hospital is gender neutral in the circumstances of this case. We do not believe that SKEW has an interest in that issue. The relief requested by SKEW in its response makes it clear that it wishes to have its job evaluation plan declared gender neutral. This is a different question than that which the Tribunal must decide. SKEW's interest in this regard is clearly incidental or collateral to the main issue in these proceedings.

119. Secondly, any decision by the Tribunal regarding the Hospital's proposed comparison system will affect the Hospital since it is the Hospital which must respond to any order by the Tribunal. The *Pay Equity Act, 1987* makes no provision for an order directed at those persons or advisors who assist employers or bargaining agents to develop comparison systems.

120. Counsel for ONA referred the Tribunal to the decision of the Ontario Labour Relations Board in *The Toronto Building and Construction Trades Counsel* v. *Napev Construction Limited and Vepan Leaseholds Limited* [1976] O.L.R.B. Rep. March 109. In this case the Board considered whether a commercial and incidental interest entitled a union to intervene in a proceeding under section 1(4) of the *Labour Relations Act* R.S.O. 1980 c. 228. The Board cited the decision in *Moser* v. *Marsden* (1892), 1 Ch. 487 (C.A.) which held that a person who would only be commercially and incidentally injured by a judgment is not entitled to be made a party to an action on the grounds of such prospective injury.

121. The Board also cited the decision of Master Barlow in *Westgate* v. *Sudbury Rand Mines Ltd.*, [1940] O.W.N. 258 which held as follows:

> The law is neatly stated in Holmstead, 5th ed, p.656 as follows:
>
> > A person who would be commercially and incidentally, but not legally and directly, injured by a judgment being obtained against the defendant in an action, is not entitled, on the ground of such prospective injury, to be made a party to the action.

122. In the *Haldimand–Norfolk* case the Tribunal refused Mercer's request for intervenor status. In its Ruling, dated June 26, 1989 it held that:

> 5. In light of the issue being whether the employer in this case has negotiated in good faith and endeavoured to agree upon a gender neutral comparison system and a pay equity plan for these bargaining units, we find that William M. Mercer has only a commercial and incidental interest in the proceedings before us. Accordingly, we do not grant intervenor or party status to William M. Mercer Ltd.

123. In conclusion, as in the *Haldimand–Norfolk* decision, we find that SKEW's interest is commercial in nature and incidental to the main issue before the Tribunal.

Is the proposed intervenor requesting status as a friend of the Tribunal? Will the intervenor bring to the proceeding an expertise concerning the policy, factual or legal issues in dispute which is different than that of the parties?

124. We note Ms. Legault's argument that SKEW is not seeking standing as an *amicus curiae*. We are of the view that such standing is not appropriate in this case.

125. There is no doubt that hearing from the entity which created or markets the job evaluation plan upon which the Hospital's proposal regarding a comparison system is based would be helpful to the Tribunal. Nevertheless, the question remains as to whether SKEW is entitled to party status in these proceedings on the basis of its expertise and the assistance it could render to the Tribunal. We would expect that the assistance with regard to the Hospital's proposals would come through evidence led by the Hospital. How that evidence is provided to the Tribunal, whether through calling SKEW as a witness or otherwise, is clearly a matter for the Hospital to decide.

126. We turn now to the issue of whether SKEW's participation at the hearing would ensure that further complaints by ONA against other hospitals could be avoided. In our view, there is no reason to believe that a decision in this case regarding the Hospital's proposals for a comparison system would apply to other hospitals to which SKEW provides advice. As we have noted earlier, the issue of gender neutrality of a comparison system must be viewed within the context of a particular workplace. One cannot simply employ the reasons and decision of this panel relating to Women's College Hospital and apply it to another hospital without ensuring that those reasons are applicable to that hospital.

127. This principle was recognized by the Ontario Court of Appeal in its decision in *Re Schofield and Minister of Consumer and Commercial Relations* (1980), 112 D.L.R. (3d) 132; 28 O.R. (2d) 764 (O.A.C.). In that case a solicitor applied for an order permitting him to intervene on behalf of two clients in an appeal in which neither he nor the clients were directly involved.

128. The basis of the solicitor's application was that in one case he represented a client who had a similar case pending before the Supreme Court of Ontario. The solicitor submitted that the outcome of that case would be determined by the outcome of the appeal in the *Schofield* case. He also represented a client whose litigation had been settled with reference to the outcome of the appeal in the *Schofield* case. Madam Justice Wilson rejected intervenor status on that basis. At pages 134–135 she held as follows:

> Is it appropriate for this Court to determine whether or not the decision in Schofield will govern Client A's case and then, on the basis of an affirmative answer to that question, find that Client A is a person "interested" in this appeal? I do not think so. I think that is 'putting the cart before the horse'. It is surely for the Court hearing Client A's case to decide whether or not *Schofield* is applicable to the facts of that case. This is fundamental to the operation of the doctrine of precedent.

Are there other mechanisms for dealing with the intervenor's concerns such as the filing of independent complaints, consolidation of hearings, or appearing as a witness for one of the parties?

129. Filing of independent complaints and the consolidation of hearings are not applicable in this case. The possibility of SKEW appearing as a witness in these proceedings exists; however, no clear indication that this option would be taken was given at the hearing. Therefore, this factor is not helpful in our deliberations.

What prejudice will there be to the parties if the intervenor is permitted to participate in the proceedings as a party?

130. The first issue is whether the intervention will widen the issues in dispute. If SKEW is permitted to participate as a party in these proceedings its participation would be limited to the issue of the gender neutrality of the Hospital's proposals. Since the Tribunal has the authority to control the proceedings before it, it can ensure that the parties will not venture beyond what is in issue. Therefore, this factor, while important, is not determinative in this case.

131. The second aspect of this factor is whether the intervention will delay an expeditious determination of the dispute. Ms. Legault submitted that if SKEW was allowed to participate, the Hospital's case would in fact be shorter. Since SKEW would proceed to lead expert evidence to meet the various allegations made by ONA, the Hospital would not have to call much evidence on the technicalities of the Aiken Plan.

132. There is no doubt that the addition of SKEW would lengthen the proceedings. There is the possibility that ONA's witnesses, who would be testifying as to the gender neutrality of the Hospital's proposed comparison system, would be subject to two cross-examinations. If any witnesses are tendered as experts, there is the possibility that two counsel would cross-examine on their credentials. Furthermore, SKEW would have the opportunity of cross-examining the Hospital's witnesses as well.

133. Ms. Legault has indicated that SKEW would in all likelihood call one or two expert witnesses. There is, then, the possibility of two sets of cross-examinations of those witnesses. By adding another party we would be adding another final argument. Finally, any objections raised by any participant will simply take longer to resolve.

134. In our view, the possibility for lengthening the proceedings and therefore delaying a final determination of the dispute is significant. While delay, in and of itself, is not determinative of the issue here, nevertheless, it is a factor to be taken into account.

135. A separate issue raised by Ms. Cornish was that by permitting the intervention of SKEW in this case, ONA would be subjected to a double defence. In other words, ONA would be faced with two counsel leading evidence on the same issue. Furthermore, as noted earlier, the Hospital's Application will be heard together with ONA's Application. The allegations the Hospital makes

against ONA in its Application and the relief sought are similar to that which is found in its Response to ONA's Application. If SKEW were permitted to participate in these proceedings as a party, its evidence would not be limited solely to meeting the allegations made by ONA in its Application, but would of necessity go towards assisting the Hospital with its own case. To allow a consultant to either defend or prosecute a complaint as a full party to the proceedings would be prejudicial to ONA in this case.

136. Another factor to be considered is whether the intervention would unreasonably add to the cost of the proceedings for the parties. This issue was not argued in this case and therefore it is not a factor which we take into account.

CONCLUSION

137. In considering the various factors and criteria we have concluded as follows.

138. In our view, the Tribunal is primarily concerned with the resolution of issues between particular parties. The issue before us is the gender neutrality of the proposals regarding a comparison system put forward by Women's College Hospital. We have concluded that SKEW has an incidental interest in the subject matter and outcome of these proceedings; that it is the Hospital which is obligated to respond to the allegations raised by ONA and which is in a position to bring to the attention of the Tribunal the issues, evidence, and legal considerations upon which its defence rests; and finally, not only would the determination of the issues in these proceedings be delayed if SKEW was added as a party but also ONA would be prejudiced by the prospect of facing a double defence on the issue of the Hospital's proposals for a gender neutral comparison system.

139. Weighing all the factors and criteria, and assuming that we have the authority to grant party status to SKEW, we are of the view that it would be inappropriate to exercise our discretion in favour of adding SKEW as a party in these proceedings.

140. Accordingly, SKEW's application is dismissed.

0001-89 Ontario Nurses Association, Applicant v. Regional Municipality of **Haldimand-Norfolk**, Respondent **(No. 5)**

Before: Janis Sarra, Vice-Chair and Members Sharon Laing and Geri Sheedy

Appearances: Mary Cornish for the Applicant, Ontario Nurses' Association; Paul Wearing for the Respondent, Regional Municipality of Haldimand-Norfolk; Mary Eberts for the Applicant for Intervenor Status William M. Mercer, Limited

Application of Act - Party
Practice and Procedure - Intervention

The Applicant Union alleged that the Respondent Municipality had failed to bargain in good faith and to endeavour to agree upon a gender neutral comparison system and a pay equity plan contrary to s. 14 of the *Act*. M., a job evaluation

consulting company, applied to intervene in the proceedings on the basis that its business could be adversely affected by the decision of the Tribunal. The Union opposed the application and the Municipality supported it.

The Tribunal dismissed M.'s application to intervene.

Intervention can take two forms, as a "friend of the Tribunal" or as a party intervenor. In this case, M. seeks status only as a party intervenor. The Tribunal does not have jurisdiction under the *Act* to add parties. Section 32(1) specifies the parties to a proceeding before the Tribunal, and s.29(2)(b) does not extend or amplify that section. It is not necessary to settle the meaning of s.5 of the *Statutory Powers Procedure Act*, R.S.O. 1980, c.484, because in any event, on the basis of the common law criteria determining intervention, the Tribunal would not grant M. status to participate. Given the statutory framework of the *Pay Equity Act, 1987*, as well as the issues in dispute in this case, M. does not have a recognizable interest which differs from the Respondent. The cases which come before the Tribunal are in the nature of a *lis inter partes*, and the particular issue in dispute in this case is not the gender neutrality of M.'s methodology in general, which is the commercial interest which M. is seeking to protect, but the gender neutrality of the proposals put forward by the Respondent. The use of consultants or their private plans is incidental to the obligations employers and bargaining agents have under the *Act*. To grant M. status would unnecessarily add to the length and cost of the proceedings, which the Tribunal must balance against the need to be fair, accessible and efficient in its adjudication of disputes. There is no reason to lengthen or complicate the process when M. is not subject to any result of the hearing.

Champ d'application de la Loi - Partie
Pratique et procédure - Intervention

Le syndicat requérant prétend que l'intimé, la municipalité, n'a pas négocié de bonne foi et ne s'est pas efforcée de convenir d'un système non sexiste de comparaison et d'un programme d'équité salariale contrairement à l'article 14 de la Loi. M., un cabinet d'experts-conseils dans le domaine de l'évaluation des emplois, a demandé de participer à l'instance à titre d'intervenant en faisant valoir que la décision du Tribunal pourrait avoir des conséquences néfastes sur ses affaires. Le syndicat s'opposait à la requête du cabinet et la municipalité l'appuyait.

Le Tribunal a rejeté la requête en intervention de M.

L'intervention peut prendre deux formes : «intervenant bénévole» ou partie intervenante. Dans la présente cause, M. ne cherche qu'à obtenir le statut de partie intervenante. La Loi n'autorise pas le Tribunal à joindre des parties. Le paragraphe 32 (1) précise les parties à une instance tenue devant le Tribunal et l'alinéa 29 (2) b) n'étend pas la portée de ce paragraphe. Il n'est pas nécessaire de traiter de l'interprétation de l'article 5 de la Loi sur l'exercice des compétences légales, qui constitue le chapitre 484 des L.R.O. de 1980 car, en tout état de cause, le Tribunal n'accorderait pas, en fonction des critères de common law régissant l'intervention, l'autorisation à M. d'intervenir dans l'affaire. Étant donné le cadre législatif de la Loi de 1987 sur l'équité salariale ainsi que les questions litigieuses en cause, M. n'a pas un intérêt reconnaissable différent de celui de l'intimé. Les causes dont est saisi le Tribunal sont des lis inter partes et la question qui fait l'objet du présent litige n'est pas le caractère sexiste ou non sexiste des méthodes, en général, de M., ce qui constitue l'intérêt commercial que M. cherche à protéger, mais le caractère non sexiste des projets de l'intimé. Le recours à des experts-conseils ou l'emploi de leurs programmes privés sont des questions accessoires aux obligations qui lient les employeurs et les agents négociateurs en vertu de la Loi. L'octroi du statut d'intervenant à M. augmenterait inutilement la durée et le coût de l'instance. Le Tribunal doit tenir compte de cet élément et du besoin de régler les litiges d'une manière juste, accessible et efficace. Il n'y a pas lieu d'allonger ou de compliquer le processus quand M. n'est pas visé par le résultat de l'audience.

Cases Referred To

Cardinal and Oswald and Director of Kent Institution, Re, [1985] 2 S.C.R. 643

Clark and Attorney-General of Canada, Re (1978), 17 O.R. (2d) 593 (H.C.J.)

Collins and Pension Commission of Ontario, Re; Bachelor and Pension Commission of Ontario, Re (1986), 56 O.R. (2d) 274 (Div. Ct.)

Federation of Women Teachers' Associations of Ontario and Ontario Human Rights Commission, Re (1988), 67 O.R. (2d) 492 (Div. Ct.)

Napev Construction Limited and Vepan Leaseholds Limited, [1976] O.L.R.B. Rep. Mar. 109

Schofield and Minister of Consumer and Commercial Relations, Re (1980), 112 D.L.R. (3d) 132; 28 O.R. (2d) 764 (Ont. C.A.)

Starr and Township of Puslinch, Re (1976), 12 O.R. (2d) 40 (Div. Ct.)

Statutes Referred To

Human Rights Code, S.O. 1981, c.53, s.38.

Labour Relations Act, R.S.O. 1980, c.228, s.1.

Pay Equity Act, 1987, S.O. 1987, c.34, ss.4, 5, 6, 7, 12, 13, 14, 22, 29, 32.

Police Act, R.S.O. 1980, c.381, s.2.

Statutory Powers Procedure Act, R.S.O. 1980, c.484, s.5.

DECISION OF THE TRIBUNAL, NOVEMBER 22, 1989:

1. This is an application by the Ontario Nurses' Association alleging that Respondent Employer, the Regional Municipality of Haldimand-Norfolk, has acted contrary to the *Pay Equity*

Act, 1987 and in particular, sections 4, 5, 6(1), 7, 12, 13 and 14 of the *Act*. During the course of the hearing on June 23, 1989, the firm of William M. Mercer Limited (herein "Mercer") made an application for intervenor status in the proceedings. Also at issue was a letter sent from Mercer to the Applicant Ontario Nurses Association. The Tribunal gave an oral ruling and subsequently in October 1989 the Tribunal was requested to give reasons. These reasons follow.

2. The full text of the oral ruling on June 26, 1989 was:

> 1. The Tribunal makes the following unanimous ruling with respect to the request by William M. Mercer Limited to seek intervenor status in these proceedings:
>
> 2. The issue before the Tribunal at this point is the allegation by the Applicant Union that the Respondent Employer has failed to negotiate in good faith and endeavour to agree upon a gender neutral comparison system and a pay equity plan for its bargaining units contrary to the *Act* and particularly sections 4, 5, 6(1), 7, 12, 13 and 14. The Applicant alleges that the Respondent has unilaterally adopted and is implementing a gender biased comparison system and pay equity plan contrary to the *Act*.
>
> 3. The only relevant issues before the panel are the issue of good faith bargaining and the issue of gender neutrality of proposals put forward by the Respondent in this case. Evidence relating to the gender neutrality of the Mercer Plan or any other plan is relevant only insofar as it relates to the gender neutral comparison system and the pay equity plan that these parties are required to negotiate under the *Pay Equity Act, 1987*.
>
> 4. We have heard that the Respondent intends to lead evidence with respect to the Mercer Plan as it has been tabled and negotiated in this case; that evidence is relevant to the determination of the issues before us. Similarly, it is for the Applicant to lead evidence only on those aspects of Mercer or any other plan or comparison system that are relevant to the issues before us. In terms of the evidence that has already been led, it will be for the Tribunal to decide what is relevant to the determination of this case.
>
> 5. In light of the issue being whether the Employer in this case has negotiated in good faith and endeavoured to agree upon a gender neutral comparison system and a pay equity plan for these bargaining units, we find that William M. Mercer Limited has only a commercial and incidental interest in the proceedings before us. Accordingly, we do not grant intervenor or party status to William M. Mercer Limited.
>
> 6. With respect to the request by the Applicant for direction on the letter from Ms. Eberts to Ms. Cornish, the matter between William M. Mercer Limited and the Ontario Nurses Association involves interests outside the scope of this hearing and accordingly, we make no comment.

3. William M. Mercer Limited sought intervenor status on the basis that the company has an interest in these proceedings, namely that its business may be adversely affected by a decision of the Tribunal. Mercer stated that the plan marketed by the company does not function in a generic manner. It believes because the Applicant Union has referred to the company's job evaluation methodology as "off the shelf" or "a priori", that allegations with respect to gender bias, if upheld by the Tribunal, could have long term negative commercial effects. Mercer asked for standing as a

party intervenor under Section 5 of the *Statutory Powers Procedures Act* R.S.O. 1984 c.484, with the right to call witnesses, to cross-examine the Applicant's witnesses on issues of gender bias in the Mercer Plan and to make submissions. Mercer did not seek to adduce evidence on the bargaining history between these parties. The Respondent Employer supported and the Applicant Union opposed the intervention application.

4. Intervention can take two forms, as a "friend of the Tribunal" or as a party intervenor. A person or entity can seek to participate in the proceedings as a friend of the Tribunal, to protect some general public interest not represented by the parties, or to provide the Tribunal with some expertise in an area of fact, law or policy which could appreciably assist the Tribunal in its determination of the issues in dispute. The nature and extent of participation is at the discretion of the Tribunal in such a case. Mercer does not seek status on this basis and we need not consider this further.

5. In determining whether or not William M. Mercer Limited should have party intervenor status in these proceedings, the Tribunal must address several questions. First, does the Tribunal have the jurisdiction to add parties other than those specified under Section 32 of the *Pay Equity Act, 1987* and if so, what are the considerations? Second, what are the issues in dispute in this proceeding? Third, what is the nature of the interest or concern of the entity seeking to intervene? Finally, should the Tribunal grant intervenor status based upon these considerations?

6. The objective of the *Act* is that affirmative action be taken to redress systemic gender wage discrimination; it is accomplished in a unionized setting through the negotiations between employers and bargaining agents of a pay equity plan and a gender neutral comparison system. The *Act* contemplates that these normally would be the parties to a proceeding before the Tribunal.

7. Section 32(1) of the *Pay Equity Act, 1987* states:

> (1) Where a hearing is held before the Hearings Tribunal or where a review officer investigates for the purposes of effecting a settlement of an objection or complaint, the parties to the proceeding are,
>
> (a) the employer;
>
> (b) the objector or complainant; and
>
> (c) the bargaining agent (if the pay equity plan relates to a bargaining unit) or the employees to whom the plan relates (if the plan does not relate to a bargaining unit).

8. Section 32(1) specifies parties of right to a proceeding before the Tribunal. It mirrors the statutory framework of the *Act*. Proceedings under the *Act* arise directly out of complaints laid under Section 22 which states: "Any employer, employee or group of employees, or the bargaining agent, if any, representing the employee or group of employees, may file a complaint with the Commission complaining that there has been a contravention of this *Act*, the regulations or an order of the Commission." It is out of this provision that the complaint before us arises. Similarly, other provisions in the *Act* provide that the same parties can object to plans and seek dispute resolution or adjudication. The provisions specify how and under what conditions the parties may bring a matter

to the Tribunal. The codification of parties under Section 32 is part of the mechanism provided for in the statute, to deal with complaints and objections between the persons or entities who have rights and obligations under the *Act*. Similarly, the *Act* provides for the Tribunal to order remedies or take other action with respect to those persons or entities who have rights and obligations under the *Act*. The wording of Section 32 reflects this statutory framework.

9. Counsel submitted that the Tribunal can expand the definition of parties under section 29(2)(b) of the *Act*. Although the Tribunal has the authority under Section 29(2)(b) to "make rules for the conduct and management of its affairs and for the practice and procedure to be observed in matters before it"; such a provision does not, as Counsel would suggest, override a statutory limitation placed on the Tribunal; it does not extend to amend or amplify the statutory provisions of parties to the proceeding which are specified in Section 32 of the *Pay Equity Act, 1987*. The Tribunal must therefore consider by what other authority the Tribunal may be able to add party intervenors to a proceeding.

10. We now consider whether Mercer can succeed in its application for status on another basis, either Section 5 of the *Statutory Powers Procedures Act* R.S.O. 1980 c. 484 or the common law. We must assess whether, as Counsel for the Respondent and Mercer have suggested, Section 5 expands the definition of parties to a proceeding of the Tribunal. Section 5 was enacted as a codification of the common law to ensure natural justice and fairness; it specifies who parties are as of right:

> **5.** The parties to any proceedings shall be the persons specified as parties by or under the statute under which the proceedings arise or, if not so specified, persons entitled by law to be parties to the proceedings.

11. If Section 5 is interpreted to read that where a statute specifies parties, those are the only parties to the proceedings, the application by Mercer cannot succeed. If however, Section 5 is interpreted to include those parties who are entitled by law even if they are not so specified, such interpretation may allow for party intervenors not specified in Section 32 of the *Pay Equity Act, 1987*.

12. In our view it is not necessary to decide the meaning of Section 5, because even if we adopted the larger interpretation of its meaning, we would still not grant Mercer status in the proceedings before us. Assuming without finding that Section 5 allows the Tribunal to add party intervenors because a person or entity has some recognizable interest in the proceeding before the Tribunal, Mercer's application for status on the basis of a commercial as opposed to legal interest must be considered based upon the criteria of intervention. Such criteria arise out of the common law and assist in determining whether an intervention should be allowed. They would include:

(1) What is the nature and scope of the proposed intervenor's concern in these proceedings?

(2) Are there other mechanisms for dealing with the proposed intervenor's concerns such as the filing of its own application for hearing or appearing as witness for one of the parties?

> (3) What prejudice will there be to the parties if the person or entity seeking to intervene is permitted to participate in the proceedings as a party? Will the intervention widen the issues in dispute? Will the intervention delay an expeditious determination of the dispute? Will the intervention unreasonably add to the cost of the proceedings for the parties?

13. When the Tribunal considers in the context of the statutory framework of the *Act* whether a party intervenor should be granted status, it must consider the nature or type of cases which come before the Tribunal, as well as the particular issues before the Tribunal in any given case. The cases are in the nature of a *lis inter partes* where proceedings will arise when there are disputes between the parties who have the rights and obligations under the *Act* to negotiate or to establish and maintain pay equity. Proceedings before the Tribunal will also deal with alleged breaches of the *Act* where a party with rights under the *Act* requests that the Tribunal find a breach and order remedial action for or against the parties specified under the law as having rights or obligations in the process to establish and maintain pay equity.

14. The sections which are alleged to have been contravened in this case are Sections 4, 5, 6(1), 7, 12, 13, and 14. The Sections are helpful in assessing the nature of the case before us:

> 4.-(1) The purpose of this Act is to redress systemic gender discrimination in compensation for work performed by employees in female job classes.
>
> (2) Systemic gender discrimination in compensation shall be identified by undertaking comparisons between each female job class in an establishment and the male job classes in the establishment in terms of compensation and in terms of the value of the work performed.
>
> 5.-(1) For the purposes of this Act, the criterion to be applied in determining value of work shall be a composite of the skill, effort and responsibility normally required in the performance of the work and the conditions under which it is normally performed.
>
> 6.-(1) For the purposes of this Act, pay equity is achieved when the job rate for the female job class that is the subject of the comparison is at least equal to the job rate for a male job class in the same establishment where the work performed in the two job classes is of equal or comparable value.
>
> 7.-(1) Every employer shall establish and maintain compensation practices that provide for pay equity in every establishment of the employer.
>
> (2) No employer or bargaining agent shall bargain for or agree to compensation practices that, if adopted, would cause a contravention of subsection (1).

15. Section 12 provides that every employer to whom the Part applies, before the mandatory posting date, shall use a gender neutral comparison system to compare female and male job classes in the establishment to determine whether pay equity exists. Section 13 requires the preparation of documents called pay equity plans and sets out detailed requirements for the plans. Section 14 requires the employer and the bargaining agents in a unionized work place to negotiate in good faith and agree upon a gender neutral comparison system and a pay equity plan for the bargaining unit.

These sections require pay equity to be established and maintained and the vehicle to achieve this in an unionized environment is through negotiations between the employer and bargaining agent. It is evident that the nature of the cases which will come to the Tribunal under these sections of the *Act* are disputes between parties obligated to develop pay equity plans.

16. In the case before us, the issues before the Tribunal are the allegations that the Respondent Employer has failed to meet its obligation to negotiate in good faith with the Ontario Nurses' Association and to endeavour to agree upon a gender neutral comparison system and a pay equity plan, contrary to the *Act*. The relevant issues are therefore the issue of good faith bargaining and the issue of the gender neutrality of the proposals put forward by the Respondent in this case. The issue is not the gender neutrality of the Mercer methodology in general, rather the gender neutrality of the proposals put forward by the Respondent Employer. Although we accept Counsel's submission that it is not for the Respondent to defend the general job evaluation methodology of a third party, it is for the Employer to defend the proposals it has tabled in order to assist the Tribunal in its determination of whether or not the Employer has complied with the duty to negotiate in good faith and the standards of gender neutrality contemplated by the *Act*. To the extent that the Mercer job evaluation methodology forms part of the employer's position at the bargaining table, it is for the employer to lead evidence with respect to its content and whether it meets these standards.

17. *The Pay Equity Act, 1987* does not include any reference to job evaluation systems. The choice by any party with rights and obligations under the *Act* to seek the assistance of a consulting firm or to select a job evaluation methodology as a tool to form the basis of its bargaining proposals, is a decision made by the party depending upon what it sees as the most useful or appropriate approach to its statutory obligations. The statute specifies that any methodology to be used must be negotiated where there is a bargaining agent. These or other methodologies may form part of the gender neutral comparison system specified by the *Act* using the factors of skill, effort, responsibility and working conditions, subject to the process of negotiations contemplated by Section 14. The use of consultants or their private plans is incidental to the obligations employers and bargaining agents have under the *Act*. There are no statutory obligations placed upon companies which develop and market job evaluation methodologies; therefore it is difficult to conclude that the Tribunal would have any jurisdiction to hear and adjudicate on a methodology outside a specific workplace context. The issue in the case now before us with respect to any aspect of the Mercer methodology is a very narrow one, and such evidence must be heard in the context of the negotiations that have taken place between these parties.

18. In assessing what the nature and the scope of Mercer's concern is in these proceedings, it is evident that Mercer is seeking party intervenor status to protect its commercial interests. It seeks to lead evidence, cross examine and make submissions on the question of the gender neutrality of the Mercer job evaluation methodology. Given the issues before the Tribunal in this case, there is not a recognizable interest which differs from the Respondent. We were informed that counsel for the Respondent would be calling expert witnesses from the Mercer firm in support of the Employer's case and leading evidence on aspects of the Mercer methodology which the Respondent has tabled in pay equity negotiations in this establishment.

19. The Tribunal must also assess what effect upon or prejudice there is to the parties if Mercer is permitted to participate. We are not persuaded that there is a danger of widening the issues in this particular case because the issues have been clearly and narrowly defined. However, to grant Mercer party intervenor status would unnecessarily add to the length and cost of the proceedings. The Tribunal must balance this against the need to be fair, accessible and efficient in our adjudication of disputes. We can find no reason to lengthen or complicate the process unnecessarily when the Mercer company is not subject to any result of the hearing. In essence, the Tribunal is being asked to give status to a potential witness who believes a criticism of its product will cause some loss in business; however, it is not the "a priori" methodology in general which is at issue, but rather those elements of the methodology which the Employer incorporated as bargaining proposals and which it tabled in pay equity negotiations. There is prejudice to the Applicant if the Employer is allowed to buttress the defence of its proposals by status being granted to Mercer as an additional party intervenor.

20. Even if Section 5 of the *Statutory Powers Procedures Act* R.S.O. 1984 c. 484 does entitle additional entities to seek status as a party intervenor, the cases cited by all three Counsel to the Tribunal are not helpful in supporting this proposition. In *Re: Collins et al and Pension Commission of Ontario et al., Re: Bachelor et al and Pension Commission of Ontario et al.* (1986), 56 O.R. (2d) 274 the Court held that the Ontario Pension Commission had breached its duty of fairness and statutory responsibilities by granting consent to an application by the employer to remove surplus pension funds without giving notice to the pension plan members. The Court held that there was a direct interest for plan holders under the statute and that those interests would be affected by the outcome of the decision. The case before this Tribunal differs in that no such direct legal interest exists for the Mercer Company. In *Re: Clark et al and Attorney-General of Canada* (1978), 17 O.R. (2d) 592 the Court dealt with the scope and appropriateness of amici curiae; the panel faced no such request in our case.

21. In *Real Cardinal and Eric Oswald and Director of Kent Institution* [1985] 2 R.C.S. 643 the Court held that the Director of a penal institution had breached his duty of procedural fairness by failing to afford prisoners the opportunity to state their case before making a decision to maintain segregated containment after a hostage taking incident. The Court said that the duty of procedural fairness extends to those whose rights and privileges are being directly and legally affected. As an administrative tribunal our duty of procedural fairness differs from that of a Director of a penal institution. However, the case is helpful in our assessment of whether in the case before us, there are rights that are directly and legally affected by not allowing Mercer to participate; finding that there are none, we find there is no breach of the duty of procedural fairness in not granting the intervention application.

22. In *Re: Starr and the Township of Puslinch* (1976), 12 O.R. (2d) 40 (Divisional Court) the Court held that the purchasers of a designated gravel pit had an interest in a rezoning application because its commercial interest was considerable to the extent that its very enterprise was in danger of being prohibited from operation and because their participation was necessary to enable the court to "effectually and completely adjudicate upon the questions involved in the action". The Court

focused upon Rule 136 of the old Rules of Civil Procedures. In the case before us, we must look to the statutory framework by which we are governed. However, even if we were to accept the Court's reasoning, the *Pay Equity Act, 1987* imposes no rights or obligations on consulting firms and there are no issues in dispute which could have the outcome of prohibiting Mercer's business operations. It is also not necessary for the Tribunal to have the participation of Mercer in order to "effectually and completely" decide the issues in dispute.

23. In *Re: Federation of Women Teachers' Association of Ontario and Ontario Human Rights Commission et al.*, (1988), 69 O.R. (2d), 492 (Divisional Court) the Federation of Women Teachers (FWTAO) was one of five affiliates to a statutory body, the Ontario Teachers Federation (OTF). Two of its women members laid complaints with the Human Rights Commission alleging that the bylaws of the OTF which require them to be members of the Women's Federation were discriminatory. The complaints were based upon the guarantees in the *Human Rights Code* S.O. 1981, c.53 with respect to membership in any occupational association without discrimination because of sex. One of the grounds upon which the FWTAO applied for judicial review was that it was denied party status by the Commission in the initial processing of the complaint. The Court, in finding that the Commission had complied with its duty to act fairly, found the FWTAO had been granted intervenor status with all the rights of a party and that it was afforded a full opportunity to make its case to the Board of Inquiry. It found that regardless of whether or not the Federation was granted status under section 38(2) of the *Code* or under Section 5 of the *Statutory Powers Procedures Act* R.S.O. 1984 c.484, that its right of appeal under Section 41 of the *Code* was preserved. It is not clear that the Court was expanding on parties specified under Section 38(2) of the *Code*, since the Court in that case did not assess the meaning of section 5 of the *Statutory Powers Procedures Act* R.S.O. 1984 c.484. Thus it is not of particular assistance to us.

24. In *Re: Schofield and the Minister of Consumer and Commercial Relations* (1980), 28 O.R. (2d) 764 (O.C.A.), the case involved no-fault benefits paid by the Minister of Consumer and Commercial Relations; others litigating the same issues sought status on the grounds that the outcome of the first appeal would directly affect one case pending and another which had settled. The Ontario Court of Appeal held that where the outcome of litigation would directly affect a subsequent case, the doctrine of precedent did not extend to deciding the applicability of one case to the facts of another case and thus the intervention application was denied. This case is helpful in reinforcing that the Tribunal is dealing with the proposals tabled by the Respondent Employer in this case and that even if Mercer were faced with the issue of gender neutrality in another case before this Tribunal, any decision here with respect to elements of the Mercer methodology tabled by the Respondent would in no way decide the second case which would rest upon its own facts.

25. In *The Toronto Building and Construction Trades Council v. Napev Construction Limited and Vepan Leaseholds Limited* (1976) OLRB Rep. March 109, the Ontario Labour Board found that a commercial and incidental interest was not sufficient to entitle an intervenor status to participate in a Section 1(4) related employer dispute. Citing both case law and the common law, the Board found at paragraph 19 that the party seeking to intervene did not have an interest within the meaning of the *Ontario Labour Relations Act* R.S.O. 1980 c.228; that any injury to the party "as

the result of the decision of the Board could only arise commercially and incidentally but not legally and directly" and the Board dismissed the intervention applications. Similarly, we find that Mercer has only a commercial and incidental interest and not a legal and direct interest in the issues in the case before us.

26. In balancing the criteria for intervention, the Tribunal finds that the nature and scope of the proposed intervenor's concern in these proceedings is not one which involves direct and legal interests. The issues before this Tribunal are whether the Respondent Employer has negotiated in good faith with the Applicant Union and whether the proposals put forward by the Respondent meet the standards of gender neutrality contemplated by the *Act*. Mercer's concerns are of a commercial nature and are incidental to the issues before us. The Tribunal acknowledges that the Respondent intends to lead evidence on the Mercer methodology in the context of the Employer's obligations under the *Act*. In summarizing our application of the other criteria, the Tribunal finds that there would be a prejudice to the parties in allowing Mercer's participation; the proceedings would be unnecessarily lengthened and more costly and would delay an expeditious determination of the dispute. We do not find that the issues in dispute would necessarily be widened. Having considered the criteria, on balance, the Tribunal finds that even if it does have authority to add party intervenors, it would not allow the intervention application in this case.

27. Accordingly, the Tribunal does not grant party intervenor status to William M. Mercer Limited in these proceedings.

0015-89 0032-89 Ontario Public Service Employees Union Applicant v. **Grey Bruce Regional Health Centre**, Respondent; Grey Bruce Regional Health Centre Applicant v. Ontario Public Service Employees Union Respondent

Before: Patricia Hughes, Alternate Chair and Members Janet Slone Taylor and Melda Okoye

Appearances: Elizabeth J. Shilton Lennon, Frances Lankin, and Terry Moore for Ontario Public Service Employees Union; Janice Baker and John Wakely for Grey-Bruce Regional Health Centre.

Practice and Procedure - Notice
PEHT - Hearing - Jurisdiction

The Applicant Union filed a complaint against the Respondent Health Centre, and the matter was referred to the Tribunal by the Pay Equity Office, Review Services. At the pre-hearing conference dealing with that matter, the Health Centre filed a complaint against the Union with the Tribunal. At the first day of hearing, the Union objected to the Tribunal's hearing the complaint of the Health Centre on the grounds that the allegations contained therein had not first been before Review Services.

The Tribunal ordered that notice be given to the Pay Equity Office before it would determine whether it had jurisdiction to hear the Health Centre's complaint.

This is the first time the specific issue of whether an application must be made to Review Services before being made to the Tribunal has come before the Tribunal. It may be correct that the Tribunal need not give notice to the Pay Equity Office in order to determine the jurisdictional issue before it, because the *Act* clearly contemplates distinct roles for the Office and the Tribunal. It might be of assistance, however, for the Tribunal to have the views of the Office on the ramifications of not following the process set out in the *Act*, or on what constitutes "following the process".

Pratique et procédure - Avis
T.É.S. - Audience - Compétence

Le syndicat requérant a déposé une plainte contre l'intimé, le Centre de santé. Les Services de révision du Bureau de l'équité salariale ont saisi le Tribunal de cette affaire. Lors de la conférence préparatoire à l'audience qui a eu lieu à ce

sujet, le Centre de santé a déposé une plainte contre le syndicat auprès du Tribunal. Pendant la première journée d'audience, le syndicat s'est opposé à ce que le Tribunal entende la plainte du Centre de santé en faisant valoir que les allégations qu'elle renfermait n'avaient pas d'abord été présentées aux Services de révision.

Le Tribunal a ordonné qu'un avis soit donné au Bureau de l'équité salariale avant de décider s'il avait compétence pour entendre la plainte du Centre de santé.

C'est la première fois que le Tribunal est saisi de la question de décider si une requête doit être présentée aux Services de révision avant de lui être présentée. Il peut être exact que le Tribunal n'a pas besoin de donner un avis au Bureau de l'équité salariale afin de trancher la question de compétence dont il est saisi étant donné que la Loi prévoit clairement des rôles distincts pour le Bureau et le Tribunal. Toutefois, le Tribunal peut juger utile d'obtenir le point de vue du Bureau sur ce qui peut arriver s'il ne suit pas le processus précisé dans la Loi ou sur la définition de l'expression «suivre le processus»

Cases Referred To.

Haldimand-Norfolk (No.1) (1989), 1 P.E.R. 1

Haldimand-Norfolk (No.2) (1989), 1 P.E.R. 13

DECISION OF THE TRIBUNAL, NOVEMBER 28, 1989:

1. Tribunal File No. 0015-89 involves allegations by the Ontario Public Service Employees Union ("OPSEU") that Grey Bruce Regional Health Centre ("Grey Bruce") has negotiated in bad faith, as well as the question of the gender neutrality of the comparison system proposed by Grey Bruce. OPSEU had applied for the assistance of Review Services; the Review Officer assigned to that application (Pay Equity File No. 89.0076) advised the Tribunal by letter dated September 12, 1989, that a settlement could not be reached and he would not be making an order in the matter. It is in that sense that it is appropriate to describe the matter as having been "referred" by the Review Officer to the Tribunal, even though OPSEU itself made an application to the Tribunal. File No. 0015-89 was set down for a Pre-Hearing Conference held on November 15, 1989.

2. At the Pre-Hearing Conference, OPSEU was served by Grey Bruce with an application to the Tribunal, naming OPSEU as respondent. That application, which was filed with the Tribunal on November 16, 1989, and was given Tribunal File No. 0032-89, also involves allegations of failing to negotiate in good faith, including the issue of bargaining on the basis of the comparison system proposed by Grey Bruce. It was listed for hearing at the same time as File No. 0015-89. The Pre-Hearing Conference Memorandum of Agreement stated, in part, that OPSEU objected to Grey Bruce's "fil[ing] a Request for Hearing", but did not give the reason for the objection.

3. At the outset of the hearing (on November 24, 1989), counsel for OPSEU began to make submissions on OPSEU's objection to our hearing the application in File No. 0032-89. It was clear from her initial submissions that her position depended at least in part on the November 16th application's having not been processed through Review Services prior to being filed with the Tribunal, on her contention that the allegations raised in File No. 0032-89 had not been before the Review Officer, and on the fact that the application which had been before the Review Officer had been made by OPSEU. In other words, OPSEU's objection of necessity involves consideration of the scheme established by the *Pay Equity Act, 1987* ("the Act") for the filing of complaints under the Act and for the manner in which complaints arrive at the Tribunal. (Grey Bruce has now filed an application with Review Services which we understand to be in relation to the matters raised in its November 16th application to the Tribunal.)

4. The Tribunal has already had occasion to consider the manner in which the functions performed by Review Services and the Tribunal interrelate in the context of when a party may request a hearing before the Tribunal in a matter apparently ongoing before a Review Officer (*Regional Municipality of Haldimand-Norfolk*, April 25, 1989) [now reported as *Haldimand-Norfolk (No.1)* (1989) 1 P.E.R. 1] and in the context of whether a response may raise allegations not brought at Review Services (*Regional Municipality of Haldimand-Norfolk*, May 11, 1989) [now reported as *Haldimand-Norfolk (No.2)* (1989) 1 P.E.R. 13]. In a sense, we are required to consider the reverse of the first of those two aspects of the legislative scheme: that is, whether the filing of an application with the Pay Equity Office is a necessary precondition of the filing of an application with the Tribunal; or, phrased somewhat differently, whether an application filed with the Tribunal may be grounded in *issues* canvassed before the Review Officer, even though they were not not framed as specific *allegations*.

5. Because of the nature of the issues and the role of the Pay Equity Office in the process established by the Act, we asked the parties to address whether we should give notice of the objection to the Pay Equity Office. Both counsel submitted that we did not need to give notice and that we could decide whether File No. 0032-89 was properly before us on the basis of submissions of the parties to the application. After hearing the submissions of counsel, we recessed and then delivered the following oral ruling:

> This is the first time this specific issue has come before the Tribunal: that is, the question of whether an application must have been made to Review Services before being made to the Tribunal or whether the issues therein must be addressed at the Review Services stage before coming before the Tribunal. While it may be correct that we do not have to give notice to the Pay Equity Office to determine whether we have jurisdiction over File No. 0032-89, since the Act clearly contemplates a process which gives distinct roles to the Pay Equity Office and to the Tribunal, we believe it might be of assistance to us to have the views of the Pay Equity Office on the ramifications of not following the process set out in the Act or on what constitutes "following the process".
>
> We note that the delay in our hearing this matter could have been avoided had the basis of OPSEU's objection been stated in the Pre-Hearing Conference Memorandum of Agreement. Notice to the Pay Equity Office could have been given in time for submissions to proceed today. (In response to this portion of our ruling, counsel for OPSEU emphasised that OPSEU had been served with Grey Bruce's application only at the Pre-Hearing Conference and had not had time to formulate the basis of its objection, an emphasis in which she was supported by counsel for Grey Bruce.)
>
> Accordingly, we direct the Registrar to give notice of this preliminary objection to the Pay Equity Office. We further direct that the Registrar abridge the time limits for the filing of a Response by the Pay Equity Office and Replies thereto to permit submissions on the preliminary objection to proceed on December 8, 1989, the next scheduled date of hearing.

0002-89 Ontario Nurses' Association, Applicant v. The County of **Middlesex and** the Corporation of the City of **London**, Respondents; The Board of Health Middlesex-London Health Unit and the Crown in Right of Ontario, Other Parties

Before: Raphael Palumbo, Vice-Chair, and Members Susan Genge and Donald Dudar

Appearances: Mary Cornish, Laura Trachuk, Ann Marie Delorey, Noelle Andrews, Marsha Palmer, Lori Newton, and Janiss Davidson for the Ontario Nurses' Association; John W.T. Judson and Robert Rowe for the Board of Health Middlesex-London Health Unit; Rodney Dale and Janet V. Collins for the County of Middlesex; James P. Barber, Anthony J. Grassi, Edward Normile, Heather Hope, H. Ross Rowe for the Corporation of the City of London; and Dennis Brown, Q.C., John Zarudny, Mary Quick, Stephen Patterson and Mary Lou Reeves for the Crown in Right of Ontario.

Interpretation - Purpose of Act - Discrimination
Interpretation - Purpose of Act - Labour Relations
Application of Act - Employer

The Union applied to have the Corporation of the City of London (the "City") and the County of Middlesex (the "County") declared the employer of the nurses at the Board of Health Middlesex-London Health Unit (the "Health Unit") for the purposes of pay equity. The City, the County and the Health Unit all took the position that the Health Unit alone was the appropriate employer under the Act.

The Tribunal held that the Health Unit is the employer for the purposes of pay equity.

The Act contains labour relations as well as anti-discrimination components. In interpreting human rights or anti-discrimination legislation, one must, while ensuring that the words are given their plain meaning, nevertheless give full recognition and effect to the rights which the statute aims to promote. The Tribunal has jurisdiction to define the issue of "employer", and it must decide it in a manner consistent with the purpose, language, structure and scheme of the Act. Where the Legislature intended to limit the Tribunal's jurisdiction it did so. Silence on the part of the Legislature does not mean that the Tribunal should adopt the labour relations tests wholesale, though some of its elements are of assistance, including: who exercises direction and control over the employees performing the work; who bears the burden of remuneration; and who is perceived by the employees to be the employer. With respect to this last test, the Tribunal must review that perception or belief with a view to determining whether it was reasonable for an employee to believe that a party was her or his employer. The tests developed in **Haldimand-Norfolk** (30 June 1989) 0001-89 (P.E.H.T.) [now reported **Haldimand-Norfolk (No.3)** (1989), 1 P.E.R. 17.] are not all encompassing, and future cases might necessitate amendments; however, those criteria are particularly appropriate to be applied here.

In applying the **Haldimand-Norfolk** test, the Tribunal finds that, first, the Health Unit has overall financial responsibility. While the Province contributes 75% of the budget, the phrase "responsibility for the budget" encompasses more than merely who can give ultimate approval or who provides funding, especially in public sector cases where agencies are dependent upon the government for funding. Rather, the notion includes factors such as who is responsible for establishing the budget and is ultimately accountable for its administration. The Tribunal wishes to make it clear that it rejects the notion that to determine the employer one looks only to the source of the funding that allows a particular entity to exist. Second, the Health Unit also has responsibility for compensation practices. The fact that a bargaining agent has recognized a party as the employer is of persuasive value, but not determinative in all cases. Third, the core activity of the service is the provision of public health programmes and services in a manner which is relatively independent, and which has been conferred on local boards of health by statute. With respect to the fourth criterion, when the evidence points inescapably to the conclusion that one party is the employer, it would be inappropriate to make a finding inconsistent with the evidence on the basis that to do otherwise would deprive a party of male comparators.

Interprétation - Objectif de la Loi - Discrimination
Interprétation - Objectif de la Loi - Relations de travail
Champ d'application de la Loi - Employeur

Le syndicat a demandé que la municipalité de London (la «ville») et le comté de Middlesex (le «comté») soient reconnus l'employeur des infirmières du Conseil de santé de la circonscription sanitaire de Middlesex-London (la «circonscription sanitaire») aux fins de l'équité salariale. La ville, le comté et la circonscription sanitaire estimaient que seule la circonscription sanitaire était l'employeur approprié en vertu de la Loi.

Le Tribunal a statué que la circonscription sanitaire est l'employeur aux fins de l'équité salariale.

La Loi comprend des dispositions ayant à la fois trait aux relations de travail et aux mesures anti-discriminatoires. Lorsqu'on interprète les textes législatifs concernant les droits de la personne ou les mesures anti-discriminatoires, il importe, tout en veillant à ce que les mots gardent leur acception normale, d'accorder néanmoins toute leur valeur et toute leur validité aux droits que la loi vise à promouvoir. Le Tribunal a compétence pour définir le concept d'«employeur» et il doit le définir d'une façon conforme à l'objet, à la langue, à la structure et au plan de la Loi. Lorsque l'Assemblée législative a voulu restreindre la compétence du Tribunal, elle a pris les moyens à cette fin. Si l'Assemblée législative ne s'est pas prononcée sur une question quelconque, cela ne veut pas dire que le Tribunal devrait adopter les tests des relations de travail en bloc, même si certains éléments de ces tests peuvent se révéler utiles, notamment : qui dirige et surveille effectivement les employés; qui a la responsabilité de leur rémunération; qui est perçu, par les employés, comme l'employeur. En ce qui concerne ce dernier test, le Tribunal doit examiner cette perception ou croyance en vue d'établir s'il est raisonnable qu'un employé ou une employée croit qu'une partie est son

employeur. Les tests mis au point dans Haldimand-Norfolk (30 June 1989) 0001-89 (P.E.H.T.) [cités maintenant dans Haldimand-Norfolk (No. 3) (1989) , 1 P.E.R. 17] ne sont pas globaux et d'autres cas peuvent nécessiter des modifications. Toutefois, ces critères sont particulièrement appropriés dans la présente cause.

Suite à l'application du test Haldimand-Norfolk, le Tribunal estime, premièrement, que l'ensemble de la responsabilité financière incombe à la circonscription sanitaire. Même si la contribution du gouvernement provincial correspond à 75 pour cent du budget, l'expression «responsabilité budgétaire» ne se limite pas seulement à la question de déterminer qui peut donner l'approbation définitive ou qui fournit les crédits, surtout dans le cas du secteur public où les organismes comptent sur les affectations budgétaires du gouvernement. Le concept de responsabilité budgétaire comprend plutôt des facteurs suivants : qui est chargé d'élaborer le budget et qui est finalement responsable de sa gestion. Le Tribunal tient à souligner qu'il rejette le concept selon lequel la définition de l'employeur se fonde uniquement sur la source de financement qui assure l'existence d'une entité particulière. Deuxièmement, la circonscription sanitaire est également responsable des pratiques en matière de rétribution. Le fait qu'un agent négociateur a reconnu qu'une partie constitue un employeur est un argument de poids, mais non déterminant dans tous les cas. Troisièmement, le gros de l'activité de l'organisme en question est de fournir des programmes et des services dans le domaine de l'hygiène publique d'une façon relativement indépendante. Cette responsabilité est conférée aux conseils locaux de santé en vertu d'une loi. En ce qui concerne le quatrième critère, quand toutes les preuves démontrent irréfutablement qu'une partie est un employeur, il serait inapproprié de prendre une décision incompatible avec ces preuves en faisant valoir qu'une décision contraire priverait une partie de catégories d'emplois masculins permettant de faire des comparaisons.

Cases Referred To

Canadian National Railway Company v. Canadian Human Rights Commisssion, 87 C.L.L.C. 17,022 (S.C.C.)
Cormier v. Alberta Human Rights Commission (1984), 85 C.L.L.C. 17,003 (Alta. Q.B.)
Haldimand-Norfolk (No.3) (1989) 1 P.E.R. 17
Morrison and the City of Kingston, Re, [1938] O.R. 21 (Ont. C.A.)
Pannu v. Prestige Cab Co. (1987), 8 C.H.R.R. D/3911 (Alta. C.A.)
Pereira, R. v. (1988), 20 C.C.E.L. 187 (Alta. Q.B.)
Province of Ontario Board of Internal Economy, [1980] O.L.R.B. Rep. Jan. 88
Waterloo County Roman Catholic Separate School Board, [1977] O.L.R.B. Rep. Dec. 856
York Condominium Corporation, [1977] O.L.R.B. Rep. Oct. 645

Statutes Referred To

Health Protection and Promotion Act, 1983, S.O. 1983, c.10, ss.4, 5, 7, 9, 51, 55, 70, 71, 75.
Interpretation Act, R.S.O. 1980, c.219, s.10.
Labour Relations Act, R.S.O. 1980, c.228.
Municipal Act, R.S.O. 1980, c.302.
Pay Equity Act, 1987, S.O. 1987, c.34, ss.1, 4, 5, 6, 7, 12, 13, 14, 30.

DECISION OF THE TRIBUNAL, NOVEMBER 30, 1989:

1. This is an Application by the Ontario Nurses' Association ("ONA") that the Respondents, the Corporation of the City of London (the "City") and the County of Middlesex (the "County") have refused to acknowledge and agree that they are the employer of the nurses at the Board of Health Middlesex-London Health Unit (the "Health Unit") for the purposes of the *Pay Equity Act, 1987* S.O. 1987 c. 34 (the "*Act*") and that the establishment therefore includes the County and City employees. It is alleged therefore, that the County and City have contravened the *Act*, and particularly sections 4, 5, 6, 7, 12, 13 and 14.

2. Prior to the commencement of the hearing, the Respondents and the Health Unit requested that the Registrar serve the Crown in Right of Ontario (the "Province") with notice of the Application. At the commencement of the hearing, the Province was added as a participant to the proceedings for the purpose of determining who is the employer of the nurses at the Board of Health Middlesex-London Health Unit.

3. On August 9, 1989 Noelle Andrews, Reg. N., the Assistant Director, Government Relations for ONA, served on Mr. Robert Rowe, Business Administrator and Secretary Treasurer of the Health Unit, a letter captioned "Notice of Desire to Bargain Between Ontario Nurses' Association and Middlesex-London Health Unit". The letter stated that ONA was "serving notice of its desire to bargain in accordance with the Pay Equity Act". The parties met but discussions were terminated quickly as there was a disagreement as to who is the employer of the nurses in the Health Unit. Ultimately, this matter was brought before the Tribunal.

THE ISSUE:

4. The issue before the Tribunal is, who is the employer of the nurses employed at the Board of Health Middlesex-London Health Unit.

THE FACTS:

5. The Ontario Nurses' Association is the collective bargaining agent for the bargaining unit composed solely of female job classes of public health nurses and registered nurses working at the Board of Health Middlesex-London Health Unit. The Respondents are the local municipal governments of the County of Middlesex and the Corporation of the City of London, two separate entities.

6. Historically, public health services in the County of Middlesex were delivered by the Middlesex County Health Unit. In the City of London, health services were delivered by the City of London Department of Health.

7. On November 24, 1970, the City of London and the County of Middlesex entered into an agreement regarding the formation of the Board of Health Middlesex-London Health Unit. The City and County agreed that the Health Unit was to be under the management of a Board of Health which was to be composed of:

1. two members appointed by the Lieutenant-Governor in Council;
2. three resident ratepayers of the County of Middlesex, appointed by its Council;
3. three resident ratepayers of the City of London, appointed by its Council.

8. The County and City each appoint their Board of Health representatives annually and have chosen in each case to appoint members of their respective Councils, although that is not required.

9. The County and the City are to share in the expenses of the Health Unit. Article 4(b) of the Agreement provided that "each party's share of the said expenses shall be the percentage of the total expenditures of the District Health Unit that the population of that party bears to the combined population of the said parties".

10. Following the formal agreement between the City and County, an Order-in-Council establishing the Health Unit was enacted by the Province on January 28, 1971.

11. Regulation 235/84 made pursuant to the *Health Protection and Promotion Act, 1983*, S.O. 1983, c. 10 provides that the Board of Health is to have six municipal members, three members to be appointed by the City Council and three members to be appointed by the County Council.

12. The *Health Protection and Promotion Act, 1983* outlines the status of a board of health. Pursuant to section 51 every board of health is a corporation without share capital. A board of health may acquire and hold real property but to do so it must obtain the consent of the majority of the municipalities within the health unit it serves. It must also obtain the consent of the Minister of Health.

13. The statutory basis for the programs provided by local boards of health is found in Part II of the *Health Protection and Promotion Act, 1983*.

14. Section 4(a) provides that every board of health:

> **4(a)** shall superintend, provide or ensure the provision of the health programs and services required by this Act and the regulations to the persons who reside in the health unit served by the board...

15. Section 5 provides that every board of health must provide or ensure the provision of health programs and services respecting community sanitation, the control of communicable diseases, preventive dentistry, family health, home care (which includes services for the acutely ill and chronically ill), nutrition, and public health education.

16. Section 7 provides that the Minister of Health "may publish guidelines for the provision of mandatory health programs and services and every board of health shall comply with the published guidelines". In April, 1989 the Ministry of Health published new guidelines under the title "Mandatory Health Programs and Services Guidelines - April, 1989". These revised programs are to be implemented over the next four years.

17. Section 9 provides that a board of health may provide other health programs or services, if the board of health deems it necessary or desirable and the councils of the municipalities in the area of the health unit approve of the provision of the program.

18. The Public Health Services Program and the Home Care Program are the two basic components of the services provided by the Health Unit. Funding for the Home Care Program is derived entirely from the Ministry of Health and the Ministry of Community and Social Services. Funding for the Public Health Services portion of the Health Unit budget is shared by the Province, County and City.

19. In 1988, the Province paid approximately 90% of the entire Health Unit budget of $20 million. The City paid approximately 9% of that budget while the County was responsible for approximately 1% of the budget.

20. There are portions of the budget to which only the City and Province contribute, and portions of the budget to which neither the City nor the County contribute. In the latter case, the Ministry of Health or other provincial ministries contribute to that budget.

21. Section 71 of the *Health Protection and Promotion Act, 1983* provides that:

> **71.** The expenses incurred by or on behalf of a board of health in the performance of the functions and duties of the board of health and the medical officer of health of the

> board of health under this and any other Act shall be borne and paid for by the municipalities in the health unit served by the board of health in such proportion as is agreed upon or, in default of agreement, in such proportion as is described by the regulations.

22. Section 1 of Regulation 382/84 made pursuant to the *Health Protection and Promotion Act, 1983* provides that the Ministry of Health *may* pay a grant to a board of health under section 75 and that the grant may not be greater than 75% of the expenses of the board of health that have been approved by the Minister.

23. While section 75 indicates that the Ministry *may* pay grants, nevertheless the evidence was that in fact it has always paid 75% of the Health Unit's expenses that have been approved by the Minister.

BUDGET PROCESS

24. The Health Unit budget includes expenditures for the Public Health Program which are funded by the Province, City and County, and the Home Care Program which is fully funded by the Province.

25. Each year the Ministry of Health issues a guideline to the boards of health regarding the amount that will be approved by the Ministry as a base budget. The amount is normally the previous year's approved or adjusted budget plus a certain percentage, which in the last two years has been 4%.

26. The Health Unit budget is prepared by the Health Unit itself. Of the total budget, 85% is composed of salaries and benefits. In some years, because of staff additions approved by the Ministry of Health in the previous year, or because of negotiated settlements with bargaining agents at the Health Unit, the cost of personnel has exceeded Ministry guidelines.

27. Once the budget draft is completed, it is reviewed by the Board of Health members on a line-by-line basis. At that time the Board can make changes to the proposed budget either through additions, deletions, or re-allocations. Following the review the budget is adopted and approved by members of the Board of Health. The budget is then forwarded to the Ministry of Health.

28. The Ministry of Health has the right, which it has exercised, to amend the budget submission on a line-by-line basis. This reflects the Ministry's control over the number of people the Health Unit employs and the costs it identifies to support those persons. When new programs are introduced or existing programs are expanded, they require the addition of either professional or support staff. The new programs cannot be implemented until such time as the Ministry has approved the addition of that staff.

29. The Health Unit's overall budget is reviewed only by the Ministry of Health. The City and County do not receive copies of the budget but rather are forwarded a description of services and a request for the funds to be allocated to the various programs provided by the Health Unit. While the City and County could request copies of the budget, they have never done so.

30. Neither the City nor the County have the right to amend the Health Unit budget on a line-by-line basis. In fact, the municipalities only review the allocation requests and not the entire budget. The evidence also disclosed that the Health Unit budget is not consolidated in either the City or County budget.

31. The evidence of Mr. Rowe was that he does not consult with the City Treasurer prior to submitting the Health Unit's budget to the Ministry of Health. Nor does he consult with the City Treasurer in preparing the budget itself, except to the extent that the Health Unit provides information regarding the City's apportionment.

CITY AND COUNTY ALLOCATION REQUESTS

32. In 1986, the City of London developed a budget submission format, entitled "Program Plan and Budget". It is employed by the Health Unit to provide information on programs it provides, as well as information to support the Health Unit allocation request.

33. The evidence disclosed that there is a formal process whereby the City reviews the Health Unit's allocation request. When that request is received, various City personnel review it to ensure that it is in the proper format. Mr. Rowe and Dr. Douglas Pudden, the Medical Officer of Health, appear before City Council's Community and Protective Services Committee to formally present their request and to answer any questions Committee members may have. The Committee's recommendations are then forwarded to the Board of Control, which then makes its recommendations to City Council.

34 The City has the right to amend the allocation request by either raising it, which has never happened, or by lowering it, which has occurred only once. In 1986, City Council reduced the allocations to all boards and commissions that year to make funds available for road resurfacing in the City. The allocation to the Health Unit was reduced by $4,500.00.

35. Mr. Rowe testified that the reduction of the City's allocation by $4,500.00 reduced the overall Health Unit budget by approximately five times that amount because of the interplay between the municipal and provincial funding processes. The Board of Health decided to meet the budget reduction by reducing the amount it had requested for the purchase of equipment. He testified that the Board of Health made that decision independently of the City, County or Province.

36. Mr. Rowe testified that on one other occasion there was an attempt to reduce the City's allocation to the Health Unit. In 1986, the Community and Protective Services Committee recommended to the Board of Control of the City of London that the 1986 appropriation request of the Health Unit be decreased by $10,000 from the requested amount of $1,613,551 to the amount of $1,603,551. Following submissions from the Health Unit, the Board of Control refused the request to decrease the allocation.

37. With regard to the budget allocation from the County, Dr. Pudden and Mr. Rowe appear before the Finance Committee of County Council. The amount of the County's allocation is presented to the Committee which then makes a recommendation to Council regarding the amount requested. The evidence was that the Committee has always recommended the amount requested and Council has always adopted that recommendation. While the County can amend the allocation request, in fact it has never altered it in any way.

38. The evidence disclosed that there were occasions when members of the Board of Health were themselves involved in the County funding process as County Councillors. During the 1986 Finance Committee meeting which dealt with the Health Unit's funding request, the councillor who moved to accept the Health Unit submissions at the Finance Committee was also a member of the Board of Health.

COLLECTIVE BARGAINING

39. At the present time, there is a collective agreement between the Board of Health Middlesex-London District Health Unit and ONA which expires on December 31, 1990. According to the terms of that agreement, the Board of Health is described as the employer. Article 6 of the agreement deals with salaries and professional classifications. Appendix "A" to the Agreement specifies the salaries for public health nurses, home care case managers, and registered nurses.

40. The collective bargaining at the Health Unit is conducted by a bargaining committee with Mr. John Judson as chief negotiator. Dr. Pudden and Mr. Rowe act as advisors. Neither the City nor the County have ever bargained collectively with any of the Health Unit's employees. The collective agreements are ratified by the Board of Health members on recommendation from the bargaining committee.

41. The evidence was that the major factor relevant to the the setting of wages was the position taken by ONA and the Board during collective bargaining. The union presents its position and the Board tries to make "the best deal possible". In so doing, the Board reviews its budget and the funds available to it; however it is still the content of the collective agreement which governs salary rates.

42. Mr. Rowe testified that since 1972 the bargaining process has resulted in some collective agreements that were different from what was anticipated in the budget process. He testified that in the most recent collective agreement reached with ONA the cost of that agreement is close to 6% whereas the Health Unit is operating with a Ministry guideline of 4%. He indicated that the Health Unit would find a way to deal with that problem. Mr. Rowe testified that in almost all cases collective agreements have been reached after the budget for the Health Unit has been set.

43. Janiss Davidson, employed by ONA as a Coordinator of Employment Relations, suggested that the 25% funding made by the municipalities would predetermine the 75% funding that the Province would provide. Her evidence was that if the municipalities could be persuaded to pay more than the 25% they paid the year previously, then the amount the Province would pay as its

75% share would increase proportionately. She indicated that the 25% funding from the municipalities is pivotal in the setting of compensation rates. Any increase in funding by the municipalities and consequent increase by the Province would set the boundaries in which ONA and the Health Unit could negotiate a salary increase.

44. Mr. Rowe disagreed with Ms. Davidson on this point. His evidence was that even if the City and County decided to allocate more funds to those programs which they and the Province fund together, the Province would not be obligated to increase its funding proportionately. He also testified that the Health Unit did not have the right, given the Agreement entered into by the City and County, to request that they pay more than their share of a program that is apportioned between them and the Province.

CONDUCT OF BOARD OF HEALTH MEMBERS

45. Mr. Rowe commented on the manner in which the City, County and Provincial appointees have conducted themselves while sitting as members of the Board of Health. He testified that the appointees behave as Board of Health members. He could remember no instance where there has been block voting by municipality. With respect to collective bargaining, his evidence was that he has never observed any conduct on the part of a Board member which reflected the interests of the municipality from which he or she came, as opposed to the interests of the Board. In Mr. Rowe's opinion, on only one occasion did he observe a situation in which a member of the Board was acting or voting not in the interests of the Board but in the interests of the municipality which appointed him. In that instance, a Board member appointed by the City suggested that the Health Unit's new offices should be located on a site that was tax-revenue producing to the City rather than at the County Building which, as a municipal site, is not subject to property taxation. However, the Board did not follow that suggestion.

46. There was some evidence that City Council did attempt to direct Board members regarding the affairs of the Health Unit. At its session held on April 21, 1987 City Council resolved as follows:

> 5(c) That the City Council representatives on the Middlesex-London Health Unit be requested to ensure that the City of London does not assume any costs in connection with the Integrated Homemaker Program.

47. Mr. Don Hudson, Treasurer and Deputy Clerk of the County of Middlesex, testified that the County has not given instructions to their appointees on the Board as to how they ought to vote on particular Health Unit issues.

PAYROLL, PERSONNEL, PAYMENT OF HEALTH UNIT EXPENSES, ACQUISITION OF CHATTELS, REPORTING BY THE HEALTH UNIT

48. The Health Unit uses a bank payroll system. The payroll cheques come from the bank but have the Health Unit's name on them. The Health Unit remits all source deductions, including income tax, unemployment insurance and pension and benefit deductions, and has its own account

with the Ontario Municipal Employees Retirement System ("OMERS"). Mr. Rowe testified that there is no involvement by the City or County in the administration of the Health Unit payroll. He also indicated that the Health Unit is identified with OMERS as an employer and has its own group identification number. The Health Unit deals with a different bank than do the City and County.

49. Mr. Rowe indicated that he is responsible for payroll, the administration of benefit plans, the support staff and for the maintenance of personnel records of all employees of the Health Unit. Mr. Readings, the City Treasurer, Mr. Hudson and Mr. H. Ross Rowe, the Director of Personnel for the City of London, testified that neither the County nor the City perform any personnel functions for the Health Unit. The evidence disclosed that the City has no access to the Health Unit's personnel records.

50. The hiring, firing and discipline of the nursing staff are the responsibility of the Directors of the Public Health and Home Care Programs at the Health Unit. The Directors also direct the day-to-day work of the nurses in the two Programs. Both Directors are employees of the Health Unit.

51. Funding for the Health Unit is transferred from the County and City on a monthly basis, while the Province transfers funds twice a month.

52. Mr. Robert Rowe, as delegated by the Medical Officer of Health, is responsible for the expenses of the Health Unit. The Health Unit's accounting department issues cheques at least every other day for expenses and the payroll is bi-weekly. At no time does Mr. Rowe seek the approval of the City Treasurer to pay expenses. Neither the City nor the County makes any direct payments for the Health Unit's expenses.

53. The acquisition by the Health Unit of motor vehicles, office equipment and other chattels does not require the approval of the City or County. These items are part of the budget approved by the Board of Health members and Ministry of Health. The cost of those items would be included in the appropriation request to the City and County. How the Health Unit's money is spent is a decision made by Dr. Pudden and Mr. Rowe, under the guidance of the Board of Health.

54. The Health Unit is audited every year by Touche Ross & Company for the purposes of preparing a financial statement which is provided to the Province, City and County. The Health Unit retains the services of the same auditing firm as does the City. That is a requirement under the *Municipal Act*, R.S.O. 1980 c.302, which requires that a local board serving more than one municipality is required to retain the same auditor as the largest municipality. The auditors are hired and paid by the Health Unit.

55. The Health Unit provides to the City and County its budget allocation requests, its annual report describing the Health Unit's activities for the year and its financial statements. The financial statements prepared by the auditors for the Health Unit are included in the City's financial report. In that report the Health Unit is identified as a non-consolidated board. The financial reports contain the City's allocation to the Health Unit, the Health Unit's Balance Sheet and its Statement of Operations.

56. The Ministry of Municipal Affairs also requires reports to be prepared by municipalities regarding their expenditures. These are contained in a document known as the "Financial Information Return". The City's expenditure for health services, including its allocation to the Health Unit, is included in the Return. As well, the Return includes data respecting the number of continuous full-time employees. Included in that number are Health Unit employees.

57. The evidence was that the information required in the Return is used by the Ministry of Municipal Affairs as the basis for issuing grants to the municipalities. It is also used by the Province to gather statistical data in one, standardized and consistent form from all municipalities.

ARGUMENTS ON DETERMINATION ON EMPLOYER

ONA'S POSITION:

58. Counsel for ONA, Ms. Trachuk, submitted that the issue of defining the employer is a threshold question under the *Pay Equity Act, 1987*. Once an entity is identified as the employer in a particular situation, the establishment is determined. From that, the scope of male job classes which can be used as the basis for comparison with female job classes is established. Ms. Trachuk argued that the definition of employer under the *Act* must be viewed in this light.

59. Ms. Trachuk submitted that the Legislature delegated the task of defining the term employer for the purposes of the *Act* to the Tribunal. She rejected the notion that the Tribunal should apply existing definitions of the term employer in the absence of such a definition in the *Pay Equity Act, 1987*. She noted that in the *Haldimand-Norfolk* decision the Tribunal rejected the wholesale adoption of the tests for employer established by the Ontario Labour Relations Board. Instead, she submitted, the Tribunal developed four criteria or tests which ought to be utilized to determine who the employer is in a given situation. She argued that in formulating these tests, the Tribunal recognized the unique nature of the *Act*.

60. In applying these tests, Ms. Trachuk submitted that pursuant to section 71 of the *Health Protection and Promotion Act, 1983* the City and County have the financial responsibility to provide funding to the Health Unit. She referred as well to the agreement between the City and County which established the Health Unit and which provided that they were to share expenses. She submitted that the Board of Health's budget process is integrated with the budget processes of the City and County. Counsel also pointed to Ms. Davidson's evidence regarding the pivotal nature of the City and County's 25% contribution to the public health services portion of the budget which indicated that without the municipal contribution the Province's 75% share of the funds would not be available. Counsel also argued that as the City and County have always appointed municipal councillors to the Board of Health, and as the Board is comprised of a majority of municipal appointees, the City and County approve the Health Unit budget at the Board of Health level. She further submitted that the City and County have overall responsibility for compensation practices at the Health Unit since it is their appointees to the Board that approve the collective agreement negotiated with ONA.

HEALTH UNIT'S POSITION

61. Counsel for the Health Unit, Mr. Judson, submitted that by not defining the term employer, the Legislature believed that the commonly established definitions of that term would apply. He argued that the Tribunal ought to use the tests established for employer which already exist, since these indicia are helpful.

62. Counsel outlined the tests which he submitted the Tribunal ought to follow in order to come to a determination of who the employer is in this case.

63. Firstly, who generally exhibits the traditional characteristics of employer? He argued that the Tribunal ought to begin its deliberations using the traditional labour relations criteria for determining the identity of the employer. Secondly, he submitted that he accepted the four tests as outlined in the *Haldimand-Norfolk* decision. Thirdly, Mr. Judson argued that the Tribunal should also consider what is most consistent with the practical and common sense application of the *Act*.

64. Mr. Judson submitted that, if the tests developed by the Ontario Labour Relations Board in the *Labourers' International Union of North America, Local 183* v. *York Condominium #46 and/or Medhurst Hogg and Associates Ltd [1977] O.L.R.B. Rep. Oct 645* decision are applied in this case, they are met by the Health Unit and by no one else. Furthermore, the Health Unit meets the tests established in the *Haldimand-Norfolk* decision. Finally, he submitted that when one looks at the definition of employer which is most consistent with the practical and common sense application of the *Act*, it is the Board of Health Middlesex-London Health Unit which must be viewed as the employer of the nurses at the Health Unit.

CITY'S POSITION:

65. Mr. Barber, Counsel for the City, submitted that the Legislature intended that the Tribunal adopt the traditional tests for determining the identity of the employer which have been established and developed by the Labour Board.

66. Mr. Barber argued that it was not anticipated that the issue of employer would be litigated. He submitted that the intention of the Legislature was that where a collective agreement is in effect, one must look to that document to determine the employer.

67. Counsel submitted that to determine the meaning of the term employer under the *Act*, a textual analysis of the statute is required. He argued that where the *Act* imposes obligations on an employer, that presupposes that the proposed or alleged employer has the ability or knowledge to comply with those obligations. For example, where the *Act* requires that a document be posted in the workplace by the employer, it is implicit that the alleged employer have access to, or control of, the workplace in question. In this case, he submitted, there was no evidence to suggest that the City has any access to, or control of, the Health Unit premises.

68. Counsel submitted that where the *Act* requires the employer to provide an employee or bargaining agent with a copy of a document posted in the workplace under the *Act*, it is implicit that the employer has contact with the employee or bargaining agent who requests the document. Counsel suggested that there was no evidence of any consistent pattern of contact between officers or employees of the City and the nurses at the Health Unit.

69. Furthermore, an employer under the *Act* should have knowledge of the compensation paid to employees and should be in a position to formulate an opinion as to the value of the work on the basis of the skill, effort, responsibility of the work being performed and the conditions under which it is performed. In this case, Counsel argued, the City has no knowledge of the scheme of compensation paid to the nurses at the Health Unit. Nor does the City have any knowledge of the value of the work that they perform.

70. Mr. Barber argued that a textual analysis of the *Act* as a whole leads to the conclusion that the Health Unit is the employer in this case.

71. Mr. Barber submitted, however, that even applying the tests established in *Haldimand-Norfolk* leads to the conclusion that the Health Unit is the employer in this case.

COUNTY'S POSITION:

72. Counsel for the County, Mr. Dale and Ms. Collins, submitted that as the *Act* does not contain a definition of employer, the Tribunal must identify the employer in each case. Ms. Collins argued that the Tribunal must interpret the *Act* as a whole in order to fulfil the purposes of the legislation. She submitted, however, that no interpretation of the *Act* can be justified which ignores the realities of a unionized setting where such exists. Section 1(1) of the *Act* defines "bargaining agent" as a trade union as defined in the *Labour Relations Act* R.S.O. 1980, c.228, that has the status of exclusive bargaining agent under that statute in respect of any bargaining unit or units in an establishment. Secondly, section 14(2) of the *Act* requires that the employer and bargaining agent shall negotiate in good faith and endeavour to agree on a gender neutral comparison system and a pay equity plan. Ms. Collins submitted that once these objectives have been accomplished, the matter remains squarely within the purview of the collective bargaining system as a whole. For these reasons, Ms. Collins stated, to ignore the factors which contribute to the determination of the identity of the employer for purposes of collective bargaining is to ignore the reality of the circumstances in which the *Pay Equity Act, 1987* must be applied. In her view, a factor which is relevant for labour relations purposes in establishing the identity of an employer cannot be irrelevant for the purposes of pay equity.

73. Ms. Collins submitted that on the totality of the evidence before the Tribunal, the conclusion most consistent with the intent and language of the *Pay Equity Act, 1987* is that the Health Unit is the employer of the Applicant's members. Certainly, she argued, the evidence is not consistent with any conclusion that the County, either alone or combined with the City, is the employer.

PROVINCE'S POSITION

74. Mr. Zarudny, Counsel for the Province, adopted the submissions of counsel for the Respondents and the Health Unit regarding the tests to be used to determine the identity of the employer in this case.

75. The thrust of Counsel's argument was that the Province ought not to be named the employer of the nurses in this case solely on the basis that it provides the largest portion of the Health Unit's funds. He argued that on the basis of the tests developed in the *Haldimand-Norfolk* decision, the Province is not the employer in this case.

DECISION OF THE TRIBUNAL

76. To determine the question of employer in this case we intend to follow the approach adopted by the Tribunal in the *Haldimand-Norfolk* decision. The following issues will be canvassed:

1. We must determine the nature of the *Pay Equity Act, 1987* so that the issue of who employs the nurses at the Health Unit may be placed in its proper context.
2. We must determine whether we have the authority to define the term employer for the purposes of the *Pay Equity Act, 1987.*
3. If we are satisfied that the Tribunal has the authority to define the term employer then we must determine which tests or criteria for identifying the employer are particularly suited to proceedings under the *Pay Equity Act, 1987.*
4. We must apply the tests or criteria to the fact situation before us.

ISSUES:

1. *The Nature of the Pay Equity Act, 1987*

77. We adopt the conclusion reached by the Tribunal in *Haldimand-Norfolk* wherein they held that the *Act* contains "elements of anti-discrimination legislation both in its historical development and in its content".

78. The Tribunal was referred to several decisions respecting the manner in which this type of legislation ought to be interpreted and applied. These include: *Canadian National Railway* v. *Canadian Human Rights Commission et al.* (1987) C.L.L.C. 17,022 (S.C.C.); and *Manjit Singh Pannu, Jaspal Singh Kang and Nirmaljit Singh Gill* v. *Prestige Cab Co.* (1987), 8 C.H.R.R. D/3911 (Alta.C.A.). These decisions stand for the principle that in interpreting human rights or anti-discrimination legislation one must, while ensuring that the words of the statute are given their plain meaning, nevertheless endeavour to give full recognition and effect to the rights which the statute aims to promote.

79. In our view, this principle is statutorily recognized by section 10 of the *Interpretation Act*, R.S.O. 1980, c.19 which provides that:

> **10.** Every Act shall be deemed to be remedial whether its immediate purport is to direct the doing of any thing that the Legislature deems to be for the public good or to

> prevent or punish the doing of any thing that it deems to be contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.

80. The labour relations component of the *Act* is recognized in the collective bargaining framework for achieving pay equity in unionized work places. As the Tribunal noted in *Haldimand-Norfolk*:

> The *Act* imposes the obligation to negotiate pay equity plans and provides a detailed mechanism by which pay equity will be accomplished. The law gives clear recognition to the history and structure of collective bargaining in this province...

81. We agree with this reasoning.

2. *Does the Tribunal have the authority to define the term employer for the purposes of the Pay Equity Act, 1987?*

82. It is clear that the *Act* does not provide a definition of employer. The *Act* does, however, define the term "establishment" in terms of employees of an employer in a geographic division. In *Haldimand-Norfolk*, the Tribunal was attempting to determine whether the Haldimand-Norfolk Regional Police Force is part of the establishment of the Regional Municipality of Haldimand-Norfolk for the purposes of the *Pay Equity Act, 1987*. It was in that context that the Tribunal determined that it ought to assess the meaning of employer.

83. The issue of establishment is not directly before this Tribunal. In our view, however, we must identify the employer of the nurses at the Health Unit since that issue is before us. Section 30(1) of the *Act* provides that:

> **30.**-(1) The Hearings Tribunal has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it and the action or decision of the Hearings Tribunal thereon is final and conclusive for all purposes.

84. Pursuant to this provision, not only does the Tribunal have the statutory authority to decide the issue but in the circumstances of the case we must decide it in a manner consistent with the purpose, language, structure and scheme of the *Act*. In the early stages of the implementation of pay equity it is essential that the community be afforded some guidance as to the manner in which issues before the Tribunal will be resolved.

3. *Which tests or criteria for determining the identity of the employer in a particular case are best suited to proceedings under the Pay Equity Act, 1987?*

85. In our view, the *Act's* silence regarding the meaning of employer does not lead us to the conclusion that the Legislature intended that the Tribunal adopt the traditional labour relations tests for defining that term. As the Tribunal noted in *Haldimand-Norfolk*, where the Legislature intended to limit the Tribunal's jurisdiction it did so. For example, the term "establishment" is assigned specific geographic limits. As well, the definition of bargaining agent makes reference to the *Labour Relations Act*. In our view, therefore, had the Legislature intended that the Tribunal limit its analysis of the meaning to be attached to the term employer to that found in labour relations jurisprudence it could have done so explicitly.

86. The Tribunal was referred to several decisions regarding the manner in which one determines the meaning of the term employer in a particular case. These include: *Cormier* v. *Alberta Human Rights Commission et al.* (1984), 85 C.L.L.C. 16,018 (Alta. Q.B.); and *Regina* v. *Pereira* (1988), 20 C.C.E.L. 187 (Alta. Q.B.). These decisions hold that in determining the meaning of employer, regard must be had to the scheme and purpose of the legislation and that the determination cannot be inconsistent with the provisions of the statute of which the term forms a part.

87. It was in this context that the Tribunal in *Haldimand-Norfolk* [see *Haldimand-Norfolk (No.3)* (1989) 1 P.E.R. 16] rejected the wholesale adoption of the definition of employer developed pursuant to the provisions of the *Labour Relations Act*. We concur with that approach. In our view, it is incumbent upon us to determine the meaning of employer which is particularly suited to both furthering the objectives of the *Act* and recognizing the realities under which the parties to pay equity plans must carry out their statutory obligations.

88. As noted earlier, the Tribunal has been urged to adopt the labour relations criteria for determining the issue of employer and in particular those criteria outlined in the *York Condominium* decision. In that case, the Board indicated that in determining which of two or more entities is the employer of certain employees, it has applied the following criteria:

(1) The party exercising direction and control over the employees performing the work...
(2) The party bearing the burden of remuneration...
(3) The party imposing the discipline...
(4) The party hiring the employees...
(5) The party with the authority to dismiss the employees...
(6) The party who is perceived to be the employer by the employees...
(7) The existence of an intention to create the relationship of employer and employees...

89. In the *Haldimand-Norfolk* decision the Tribunal accepted as helpful the following criteria from the *York Condominium* decision:

1. the party exercising direction and control over the employees performing the work;
2. the party bearing the burden of remuneration; and
3. the party who is perceived to be the employer by the employees.

90. We agree that these criteria are of assistance in determining the identity of an employer under the *Pay Equity Act, 1987*. The identity of the party that exercises direction and control over employees may be of assistance in establishing who it is that makes policy decisions regarding the nature of the work to be done and the assignment of responsibility for that work. The focus of the *Act* is on the broad issue of fundamental control over compensation practices and for this reason we are of the view that identifying the party which bears the burden of remuneration is helpful to our deliberations. This is especially so since, as the *Haldimand-Norfolk* decision points out at paragraph 49, the *Act* "makes specific provision for a percentage of payroll to be directed towards

wage adjustments to achieve the purpose of the *Act*". Finally, the perception of the employees may also be of assistance since the "conduct" of an alleged employer which led to the belief or perception that he or she is the employer may be of some relevance. The only caveat we would add, however, is that the Tribunal must review that perception or belief with a view to determining whether, on the evidence, it was reasonable for an employee to believe that a party was in fact his or her employer.

91. In *Haldimand-Norfolk*, the Tribunal established the following criteria or tests for determining the identity of the employer in each case:

> 1. *WHO HAS THE OVERALL FINANCIAL RESPONSIBILITY?*
>
> Indicia of this test include: Who has the responsibility for the budget? Who bears the financial burden of compensation practices, and the burden of wage adjustments under the Act? Who is responsible for the financial administration of the budget? What is the shareholder investment or ownership? Who bears the responsibility of picking up the deficit or benefiting from the surplus?
>
> 2. *WHO HAS RESPONSIBILITY FOR COMPENSATION PRACTICES?*
> The indicia for this criteria include: Who sets the overall policy for compensation practices? Who attaches the value of a job to its skill, effort, responsibility and working conditions? What is the labour relations reality, who negotiates the wages and benefits with the union or sets the wage rate in a non-unionized setting?
>
> 3. *WHAT IS THE NATURE OF THE BUSINESS, THE SERVICE OR THE ENTERPRISE?*
>
> Within this test the following are helpful indicia: What is the core activity of the business, service or enterprise? Is the work in dispute integral to the organization or is it severable or dispensable? Who decides what labour is to be undertaken and attaches that responsibility to a particular job? What are the employees' perceptions of who is the employer?
>
> 4. *WHAT IS MOST CONSISTENT WITH ACHIEVING THE PURPOSE OF PAY EQUITY ACT?*
>
> If there is more than one possible employer, it assists the Tribunal in its determination to make reference to the purpose and objectives of the *Pay Equity Act, 1987*.

92. It is important to note that the Tribunal clearly stated that these tests were not all encompassing. Rather, there was a recognition that future cases might necessitate amendments to those tests. Nevertheless, we are of the view that these criteria are particularly appropriate in determining the identity of the employer in this particular case.

4. *Application of Tests to Facts*

(1) *WHO HAS OVERALL FINANCIAL RESPONSIBILITY?*

Who has responsibility for the budget?

93. The evidence clearly demonstrates that the largest contributor to the health unit budget is the Province. In 1988, of the total budget of approximately $20 million, the province contributed approximately $18 million.

94. The City and County fund the Health Unit budget to the extent of 25% of the public health services portion of the budget. In 1988, the City contributed slightly less than $2 million while the County's share was approximately $200,000. It must be noted that there are programs to which only the City and Province contribute and others which neither the City nor County assist in funding.

95. In our view there was insufficient evidence to corroborate the testimony of Ms. Davidson that the 25% municipal share of the public health services budget is pivotal to the funding process and that any increase in that share would mean a proportionate increase in provincial funding. In this regard we accept the evidence of Mr. Rowe.

96. It is also clear that the operating budget is prepared for the Province to review and approve. The Province reviews the budget submission of the Health Unit on a line-by-line basis. The Province must approve not only the Health Unit expenditures but also the addition of any staff for those programs for which it will contribute funding.

97. Neither the City nor the County receive the entire Health Unit budget, although there was evidence to suggest that they could receive it if they requested a copy. The evidence was that they had never made such a request. The City and County receive descriptions of the Health Unit's programs and the funds to be allocated to those programs. Neither the City nor the County have the right to amend the budget on a line-by-line basis. There was evidence that on one occasion the City reduced its allocation to the Health Unit by $4500.00. However that situation involved a reduction to all City boards and commissions, in order to provide additional funds for the City's road resurfacing program. There was no evidence that the reduction was aimed specifically at reducing the Health Unit budget. Nor was there any consideration by the City of any specific Health Unit program or service which needed to be reduced so as to make funds available for the road resurfacing program.

98. There was evidence of a significant amount of interaction between the Health Unit and the municipalities and their elected councils relating to the Health Unit's allocation requests. However, that interaction relates to the process whereby funds are made available to the Health Unit rather than any overall control over the Health Unit budget.

99. The evidence also disclosed that the Health Unit's budget submissions are included in the financial statements of the City and County. The municipalities also include their expenditures for public health services in financial returns submitted to the Ministry of Municipal Affairs. Finally, its calculation of full time employees employed in health services, the City includes a number of Health Unit staff. Again, there was no evidence, however, that these factors in any way amounted to control over the Health Unit's budget.

100. The Health Unit has carriage of its budget process. Once prepared, the budget is reviewed on a line-by-line basis by the Board of Health members. It is that Board which can amend the budget items if it so chooses. It must be kept in mind that while there is no requirement that the Board members appointed by the municipalities must be municipal councillors, the evidence

disclosed that this in fact is what has always occurred. Although one can speculate that the municipal appointees may consider the interests of their respective municipalities to some extent when they consider the Health Unit's budget, there was no evidence to suggest that this played a role in the budget process.

101. Except for the $4500 reduction in City funding and the directive by City Council in 1986 to its appointees on the Health Unit regarding the Integrated Homemaker Program, there was no evidence to establish that either the City or County have ever attempted to influence the budget process at the Health Unit.

102. In our view, the phrase "responsibility for the budget" encompasses more than merely who can give ultimate approval for the budget, or who it is that provides funding. This is especially true in the public sector where agencies are dependent upon funding from governments to carry on their responsibilities. Rather, this notion includes factors such as who is responsible for establishing the budget and is ultimately accountable for its administration. In this case, it is the Health Unit which is responsible for designing a budget which is responsive to the needs of the community which it serves and which is accountable for ensuring both that the budget commitments are fulfilled and that proper fiscal management exists.

103. On the basis of the evidence, therefore, we are of the view that the Health Unit is responsible for its budget.

104 Before leaving this discussion we wish to make it clear that we reject the notion that to determine the employer one looks only to the source of the funding which allows a particular entity to exist. In *London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C., (Applicant)* v. *Waterloo County Roman Catholic Separate School Board, (Respondent)*, [1977] O.L.R.B. Rep. Dec. 856, the Ontario Labour Relations Board held that students who were employed by the School Board during the school vacation period and whose wages were paid both out of funds provided by the School Board and funds provided by government assistance, were the employees of the School Board. At page 857 of its decision the Labour Board held that:

> ...it seems clear that by accepted labour relations criteria the School Board is in the relationship of employer to the students: it interviews them, hires them and puts them to work for a period of time at a fixed wage computed hourly, weekly or monthly. The work performed is of benefit to the School Board and to that end it assigns, directs and supervises the tasks performed.... Within that framework the students must be seen as employees of the School Board for the purposes of the *Labour Relations Act*.

105. In *Association of Commercial and Technical Employees, Local 1704, C.L.C.* v. *Province of Ontario Board of Internal Economy*, [1980] O.L.R.B. Rep. Jan. 88, the issue was who was the employer of employees in New Democratic Party Constituency offices in the Province of Ontario. The Ontario Labour Relations Board found that the Board of Internal Economy, a governing body of the Office of the Legislative Assembly, allocates provincial funds to provide constituency offices to Members of the Legislature. The Labour Board found that the individual Member of the Legislative Assembly is the employer of any person that he or she hires and directs within his or her constituency office. At page 89 of the decision the Board stated that:

> ...the Board of Internal Economy is little more than a paymaster, having no contact with the employees other than in matters related to payment of the allocated funds...

106. The Board went on to state that the extent of the direction and control by the individual Member "makes the mere mechanics of payment of wages insufficient in itself to establish the Board of Internal Economy as employer." Finally, the Board held that "...the funding and administration of wages pursuant to government programs do not of themselves cast a government body in the role of employer".

107. We agree with this reasoning. While funding is an important indicia of financial responsibility, nevertheless, when balanced against the other criteria, it is our view that theissue of funding is not determinative of the issue of employer in this case.

Who bears the financial burden of compensation practices, and the burden of wage adjustments under the Act?

108. It is clear that the Province provides approximately 90% of the Health Unit's total budget. Since the evidence disclosed that 85% of the budget is comprised of employees's salaries, an argument can be made that the financial burden for compensation practices and wage adjustments rests with the Province. The evidence also established that the Health Unit's budget is increased annually as a result of percentage increases authorized by the Province.

109. It must be remembered, however, that while the Health Unit is dependent on funding from the Province, City and County, nevertheless, it is the Board of Health which must prepare the budget upon which the allocation of funds is made. Furthermore, it is clear from the evidence that, where the Board of Health has committed itself to the payment of wages which results in the Health Unit exceeding its available revenues from the Province, it has independently decided that reductions would be made from other areas of its budget in order to comply with the burden to compensate its employees. In our view, therefore, the financial burden for compensation and wage adjustments is the responsibility of the Health Unit.

Who is responsible for the financial administration of the budget?

110. The financial administration of the budget is the responsibility of the Health Unit. The Health Unit is responsible for its own payroll and personnel. The acquisition by the Health Unit of motor vehicles, office equipment and other chattels do not require the approval of either the City or the County. This is, however, not true in the purchase and ownership of real property both of which require City and County approval. The uncontradicted evidence of Mr. Robert Rowe was that the manner in which expenditures are made by the Health Unit is decided by Mr. Rowe and Dr. Pudden, under the guidance of the members of the Board of Health. Funds are transferred to the Health Unit by the City, County and by the Province and Mr. Rowe pays the Health Unit's expenses from these funds.

Who bears the responsibility of picking up the deficit or benefiting from the surplus?

111. There has never been a budget deficit at the Health Unit. If there is ever a surplus in any budget year, it would result in a reduction in the allocation of funds by the City and County the next budget year.

(2) *WHO HAS RESPONSIBILITY FOR COMPENSATION PRACTICES?*

Who sets the overall policy for compensating practices?

112. The members of the Board of Health ratify the collective agreement with ONA. The majority of those Board members are appointed by the City and County and one could argue, therefore, that in effect the municipalities ultimately ratify the collective agreements with ONA. In our view, while the inference was raised, there was no evidence that the City or County have in any way influenced the collective bargaining process between ONA and the Health Unit. Nor was there any evidence that in voting to ratify collective agreements with ONA, Board of Health members have based their decisions on how the interests of the municipalities which appointed them might be protected or furthered. As well, there was no evidence that either the City or County received reports of the content or results of the collective bargaining process.

113. The evidence of Mr. Robert Rowe, which was not contradicted, was that the single, most important factor relevant to the collective bargaining process and the setting of salaries was the agreement reached by ONA and the Health Unit. It is the collective agreement which governs the wage rates of the nurses at the Health Unit. This is so even where the wage increase negotiated by the parties is greater than the percentage increase in funding approved by the Province.

Who attaches the value of a job to its skill, effort, responsibility and working conditions?

114. On the evidence, it is the Health Unit which hires nurses and attaches the value of their jobs to their skill, effort, responsibility, and working conditions. It is the Health Unit which develops job content and qualifications and which agrees to compensation which takes into account the above-noted factors when agreeing to compensate its employees. There was no evidence that either the City, County, or Province have any understanding of the value of the nursing work performed at the Health Unit or the skill, effort, responsibility and working conditions attached to that work.

What is the labour relations reality; who negotiates the wages and benefits with the union or sets the wage in a non-unionized setting?

115. There is clearly a history of collective bargaining between the Health Unit and ONA. For labour relations purposes, ONA has recognized in the collective agreements to which it has been a party, that the employer of its members is the Board of Health Middlesex-London Health Unit. In our view, the fact that a bargaining agent has recognized a party as the employer of its members is of persuasive value. It is not determinative of the issue of employer in all cases, however.

116. In the situation before us, it is the Board of Health which has the ultimate authority to ratify a collective agreement reached with ONA. Clearly, it is the Board of Health which negotiates wages and benefits with ONA.

(3) *WHAT IS THE NATURE OF THE BUSINESS, THE SERVICE OR THE ENTERPRISE?*

What is the core activity of the business, service or enterprise? Is the work in dispute integral to the organization or is it severable or dispensable?

117. With the enactment of the *Health Protection and Promotion Act, 1983*, it appears that the provision of public health services is entrusted to local boards of health. Pursuant to section 4 of that *Act* it is the local board of health which must superintend, provide or ensure the provision of health programs and services required under the legislation. It is also the local board of health which, pursuant to section 7 of the *Act*, must comply with the guidelines published by the Ministry of Health for the provision of the mandatory health programs and services.

118. While it may be argued that as the City and County are required to provide funding to the Health Unit and as their appointees form the majority on the Board of Health, they control the Board and therefore the provision of health programs and services. What is clear from the evidence, however, is that the City and County play a minor role in the funding of the Health Unit as compared to the Province. Secondly, not all the programs and services are offered to the County, nor does it provide funding for all programs and services. Therefore, the City and County do not control the Board of Health through control of funding.

119. As for municipal control over the Board of Health through their appointment of a majority of the Board members, there was no evidence that those members are merely agents of the municipalities which appointed them. There was also no evidence that the Health Unit regularly reports to City or County Councils or provides minutes of its meeting to those Councils. Nor was there convincing evidence which demonstrated that the City and County, through their appointees on the Board of Health, have any control over the mandatory programs and services to be delivered by the Health Unit.

120. The Tribunal was referred to the decision of the Ontario Court of Appeal in *Re Morrision and the City of Kingston*, (1938), O.R. 21 (O.C.A.). That case dealt with a the jurisdiction of the City of Kingston to pass a by-law prohibiting the possession of gambling machines without a licence obtained from the Clerk of the City. The By-law was enacted pursuant to the general provisions of the *Municipal Act* which authorized by-laws for the health, safety, morality and welfare of the residents of a municipality. The Court held that the municipality could not enact a by-law purporting to licence the use of gambling machines which was prohibited by the Criminal Code. In commenting on limitations to the general provision under which the City of Kingston enacted its by-law, Middleton, J.A., at page 26 held that:

> Dealing with the subject matter of the enactment authorized one finds that matters of "health" are generally regulated by The Public Health Act, R.S.O., 1927, ch. 262; matters of "safety" are covered by a multitude of Acts of which The Highway Traffic Act, R.S.O. 1927, ch. 251, and The Factory, Shop and Office Building Act, R.S.O. 1927, ch. 275, will serve as examples: matters of "morality" are generally dealt with by Parliament of the Dominion. The Criminal Code deals with most moral questions. More specific questions are dealt with by the Opium and Narcotic Drug Act, R.S.C 1927, ch. 144, and other familiar legislation. These topics are entirely removed from the sphere of legislation of municipal councils.

121. In our view, the *Health Protection and Promotion Act, 1983* has conferred an express authority on local boards of health to deliver public health services. Therefore, applying the analysis in *Re Morrison* to this case, neither the City nor the County has the authority to regulate the provision of public health services or to regulate the affairs of the Board of Health.

122. In the *Haldimand-Norfolk* decision, the Tribunal held that pursuant to section 2 of the *Police Act*, the responsibility for policing is a municipal function. At paragraph 54, the Tribunal held that:

> The core activity of the police force is "policing" and it is the responsibility of the Municipality. Given this responsibility, it is obvious that the police force is integral and not dispensable; there is a statutory obligation for the Municipality to provide police services.

123. The situation before us is quite different. There is an absence of any clearly enunciated declaration that the provision of public health services is the responsibility of the municipality. The core activity of the Health Unit is the provision of public health programs and services in a manner which appears to be relatively independent from the municipalities it serves.

Who decides what labour is to be undertaken and attaches that responsibility to a particular job?

124. Pursuant to section 55(2) of the *Health Protection and Promotion Act, 1983* a board of health may pass by-laws respecting the appointment and duties of officers and employees. Furthermore, pursuant to section 70(1) of the *Act*, every board of health may engage the services of public health nurses to carry out the functions of the board of health in connection with the mandatory health programs and services. Clearly, it is the Board of Health which can decide the work that officers and employees are to undertake and which job or position is responsible for undertaking certain functions. There was no evidence that the City, County, or Province directed the work at the Health Unit or in any way ensured that the work was being carried out and responsibilities were assigned.

What are the employees perceptions of who is the employer?

125. The Tribunal did not hear any evidence from members of ONA that was determinative with respect to their perception as to who is their employer.

(4) *WHAT IS MOST CONSISTENT WITH ACHIEVING THE PURPOSE OF THE PAY EQUITY ACT?*

126. The position of the Applicant is that a finding by the Tribunal that the City and County are the employers of the nurses at the Health Unit would be consistent with the purpose and objectives of the *Act*. ONA's position is that it is unlikely that male comparators will be found by all or any of the female job classes at the Health Unit if the Board of Health is found to be the employer. ONA submitted that if comparisons cannot be made between its members and employees in the City and County, there is a possibility that some of its members will not be able to obtain the benefits of the *Act*.

127. In our view, it is essential that the purpose and objectives of the *Act* are considered when it is unclear which of several potential employers is the employer of ONA's members at the Health Unit for the purposes of pay equity. We must not ignore the powerful language of the preamble and purpose provisions in the statute. That will ensure that the discrimination which this legislation was enacted to remedy will be considered when determination of issues under the *Act* arise. Nevertheless, it would be inappropriate to determine the identity of the employer in this case simply on the basis that a finding that the City or County are the employers of ONA's members at the Health Unit will furnish those employees with male comparators against which to compare female job classes at the Health Unit. Similarly, where the evidence points inescapably to the conclusion that one party is the employer, it would be inappropriate to make a finding inconsistent with the evidence simply on the basis that to do otherwise would deprive female job classes of male comparators in a particular work place.

128. The Tribunal in *Haldimand-Norfolk* held at paragraph 57 that:

> Where there is more than one possible employer, the Tribunal should decide what is necessary, fair, and workable within the structure of the *Pay Equity Act, 1987* and should make a finding that best serves the needs of those the *Act* is aimed at benefiting.

129. We agree with this principle. We would only add that in deciding what is "necessary, fair, and workable" we must not ignore the evidence, or lack of it, and come to a determination for which there is no evidentiary basis.

DECISION OF THE TRIBUNAL

130. In the circumstances of this case, and having regard for the evidence before us, it is our view that the employer of ONA's members is the Board of Health Middlesex-London Health Unit. It is the Board of Health which has the responsibility for establishing its budget, subject to final approval by the Province; for the financial administration of that budget; for compensation practices at the Health Unit and for attaching value to the work performed by the nurses at the Health Unit. Furthermore, it is the Board of Health which negotiates collective agreements with ONA and also bears the financial burden of wage adjustments. The responsibility for the delivery of public health programs and services is on the local boards of health. Finally, it is the Board of Health which is responsible for deciding the work to be undertaken and attaching the responsibility to a particular job.

131. For all these reasons, the Tribunal finds that the employer of the nurses at the Health Unit is the Board of Health Middlesex-London Health Unit. Accordingly, this Application is dismissed.

0009-89 Canadian Union of Public Employees, Local 1582 Applicant v. The Municipality of Metropolitan Toronto, Respondent, **Metropolitan Toronto Library Board**, Respondent*

Before: Beth Symes, Chair and Members Donald Dudar and Geri Sheedy

Appearances: Laura Trachuk, Steven Burdick and Lee Ramsay for the Applicant, Canadian Union of Public Employees, Local 1582; Darrell Smith, Dianne Younge, and Harold Ball for the Respondent, The Municipality of Metropolitan Toronto; John Sanderson, J.R. LeForte, and Linda Jenkins for the Respondent, the Metropolitan Toronto Library Board

Interpretation – Purpose of Act – Discrimination
Interpretation – Purpose of Act – Labour Relations
Application of Act – Employer

The issue before the Tribunal was whether the Metropolitan Toronto Library Board (the "Board") or the Municipality of Metropolitan Toronto ("Metro") was the employer of the staff at the Metropolitan Toronto Library. The applicant argued that the employer was Metro. Both Metro and the Board submitted that the Board was the employer.

The Tribunal held that Metro is the employer for pay equity purposes.

In determining who is the employer, the Tribunal starts with the applicable statutes. It then goes beyond them to examine the realities of the relationship to determine who has fundamental control over the staff. As "employer" is not defined by the *Act*, the test developed by the Tribunal must be consistent with the purpose of the *Act*, and fit within its context. The purpose of the *Act* is to redress systemic wage discrimination in the compensation of employees employed in female job classes in Ontario. This mandate is specific and different from the legal context in which other tests of employer have been developed. There may be situations where the collective bargaining employer and the pay equity employer coincide. The Tribunal will consider the collective bargaining employer but will not be limited by it. There is an ongoing responsibility to maintain pay equity, which lies outside the collective agreement. As the jurisprudence of pay equity is evolving, the issue of which entity is liable in the event that an employee is dismissed contrary to the *Act* ought not to be determined without a factual basis nor without the benefit of submissions. Because of the different purpose and aim of the *Act*, it is inappropriate to rely upon the Labour Board tests of employer. The *Act* is intended to remedy the effects of systemic wage discrimination, including those effects which result from labour relations practices.

A goal of the Tribunal is to provide decisions and reasons which not only determine the issues between the parties, but assist other parties in meeting their obligations under the *Act*. While not binding in law, the four criteria developed in *Haldimand-Norfolk* (30 June 1989), 0001-89 (P.E.H.T.) [now reported *Haldimand-Norfolk (No.3)* (1989), 1 P.E.R. 1 7] are appropriate to be used in this case. The fourth criterion is meant to be used by the Tribunal to evaluate which of the first three criteria is the most indicative of the employer/employee relationship. It is used to balance the first three where their application leads to different entitities as employer. Where the application of the first three clearly point to a particular entity as the employer, resort to the fourth criterion may not be neccessary.

In this case, on the basis of the first three criteria, the Tribunal concludes that for pay equity purposes, Metro is the employer of the library workers. Metro cannot be characterized simply as the paymaster or source of funds for the Library. Instead, Metro exercises substantial control over the Library Board's budget. First, therefore, Metro has overall financial responsibility for the Library Board. Second, Metro most heavily influences and therefore has responsibility for compensation practices. Third, the Library is integral to Metro and is not severable or dispensible from the Municipality. Public library services are a core activity of a municipality. Metro is required by statute to fund the Board as one of the services Metro must provide.

Interprétation – Objet de la Loi – Discrimination
Interprétation – Objet de la Loi – Relations de travail
Champ d'application de la Loi – Employeur

La question dont était saisi le Tribunal était la suivante : lequel du Conseil des bibliothèques de la communauté urbaine de Toronto (le «conseil») ou de la municipalité de la communauté urbaine de Toronto (la «communauté») est l'employeur du personnel de la bibliothèque de la communauté urbaine de Toronto. Le syndicat prétendait que c'était la communauté. La communauté et le conseil estimaient que c'était le conseil.

Le Tribunal a statué que la communauté était l'employeur aux fins de l'équité salariale.

Lorsqu'il détermine un employeur, le Tribunal commence d'abord par étudier les lois applicables. Ensuite, il examine la réalité des rapports pour déterminer qui a essentiellement le contrôle du personnel. Étant donné que la Loi ne définit pas le terme «employeur», le test élaboré par le Tribunal doit être compatible avec l'objet de la Loi et s'inscrire dans ce contexte. L'objet de la Loi est d'éliminer la discrimination systémique entre les sexes en ce qui concerne la rétribution du travail effectué par les employés dans les catégories d'emplois à prédominance féminine en Ontario. Ce mandat est spécifique et diffère du contexte légal qui a servi à l'élaboration d'autres tests concernant la définition d'employeur.

Il peut y avoir des cas où l'employeur aux fins des négociations collectives et l'employeur aux fins de l'équité salariale sont les mêmes. Le Tribunal tiendra compte de l'employeur aux fins de la négociation collective mais ne s'y limitera pas. Le maintien de l'équité salariale est une responsabilité permanente qui se situe hors du cadre de la négociation collective. Comme la jurisprudence dans le domaine de l'équité salariale est en évolution, la question de décider quelle entité est responsable si un employé ou une employée est congédié(e) contrairement à la Loi ne devrait pas être résolue sans un examen des faits ni sans le bénéfice de mémoires. En raison de l'objet et du but différents de la Loi, il n'est pas approprié de se fier aux tests de la Commission des relations de travail en ce qui concerne la définition

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***Notice of application for judicial review issued February 5, 1990.**

d'employeur. La Loi a pour but de remédier aux conséquences de la discrimination systémique entre les sexes en ce qui concerne la rétribution du travail, y compris les conséquences résultant de pratiques dans le domaine des relations de travail.

Un des buts du Tribunal est de fournir des décisions et des raisons qui permettent non seulement de trancher les points litigieux entre les parties, mais également d'aider d'autres parties à respecter leurs obligations en vertu de la Loi. Même s'ils n'ont pas force exécutoire, les quatre critères élaborés dans Haldimand-Norfolk (30 June 1989), 0001-89 (P.E.H.T.) [cités maintenant dans *Haldimand-Norfolk (No.3)* (1989), 1 P.E.R.17] peuvent être utilisés dans la présente cause. Le Tribunal doit utiliser le quatrième critère pour évaluer lequel des trois premiers critères est le plus indicateur de la relation employeur-employés. Ce quatrième critère est utilisé pour mettre en équilibre les trois premiers lorsque leur application pointe vers des employeurs différents. Si l'application des trois premiers critères permet de dégager un employeur particulier, il peut ne pas être nécessaire de recourir au quatrième critère.

Dans la présente cause, le Tribunal conclut, en se fondant sur les trois premiers critères, que la communauté est, aux fins de l'équité salariale, l'employeur des employés de la bibliothèque. La communauté n'est pas simplement le payeur ni la source de fonds de la bibliothèque. En fait, la communauté exerce un contrôle considérable sur le budget du Conseil de bibliothèques. Par conséquent, la communauté assume l'ensemble de la responsabilité financière du Conseil de bibliothèques. Deuxièmement, la communauté exerce une influence profonde sur les pratiques en matière de rétribution et assume donc la responsabilité de ce domaine. Finalement, la bibliothèque fait partie intégrante de la communauté et ne peut être dissociée de la municipalité. La prestation de services de bibliothèque publique fait partie des activités essentielles d'une municipalité. La communauté est tenue, en vertu de la loi, de financer le conseil étant donné qu'il s'agit d'un service qu'elle doit fournir.

Cases Referred To

Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 295; 36 C.R.R. 193

Bagby v. Gustavson International Drilling Co. Ltd. (1980), 24 A.R. 181 (Alta. C.A.) 201

Blake and Amalgamated Transit Union and the Crown in Right of Ontario (Toronto Area Transit Operators Authority) (3 May 1988), (G.S.B.) [unreported]

Canadian National Railway Company v. Canadian Human Rights Commisssion, 87 C.L.L.C. 17,022 (S.C.C.)

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Pereira, R. v. (1988), 20 C.C.E.L. 187 (Alta. Q.B.)

Province of Ontario Board of Internal Economy, [1980] O.L.R.B. Rep. Jan. 88

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Statutes Referred To

Income Tax Act, R.S.C. 1952, c.148, as am. S.C. 1970-71-72, c.63, ss.153, 248.

Labour Relations Act, R.S.O. 1980, c.228.

Municipal Act, R.S.O. 1980, c.302.

Municipality of Metropolitan Toronto Act, R.S.O. 1980, c.314.

Pay Equity Act, 1987, S.O. 1987, c.34, ss.4, 9, 13, 25.

Public Libraries Act, 1984, S.O. 1984, c.57

Authorities Referred To

Canada, *Report of the Royal Commission on Equality in Employment*, Vol.1 (Ottawa: Canadian Government Publishing Centre, 1984) (Commissioner: Judge Rosalie Silberman Abella).

DECISION OF THE TRIBUNAL, DECEMBER 5, 1989:

THE ISSUE:

1. The Applicant requested a hearing before the Tribunal with respect to an Order of a Review Officer dated June 8, 1989 requiring the Applicant union to negotiate a pay equity plan with the Metropolitan Toronto Library Board who was found by the Officer to be the employer of the staff of the Metropolitan Toronto Reference Library.

2. It is the Applicant's position that the Order is wrong; that for pay equity purposes, the employer of the staff at the Metropolitan Toronto Reference Library is the Municipality of Metropolitan Toronto; and that the Library staff must be included in the establishment of the Municipality. It is the position of the Respondent, the Municipality of Metropolitan Toronto, and of the Metropolitan Toronto Library Board that the Order is correct; that the employer of this staff is the Metropolitan Toronto Library Board; and that the staff of the Library are in a separate establishment from the employees of Metro.

3. The issue is important for the parties, as the definition of establishment determines which positions are available as potential comparators for the female job classes in the Library. The Applicant alleges that there may be no male comparators at the Library for the female job class of librarian. The Library Board's position is that although there is no agreement as to whether there are male comparators for the librarians, they should continue to negotiate this issue and if they are unable to agree, the dispute as to comparators should be referred to the Pay Equity Commission for resolution.

BACKGROUND:

4. The Canadian Union of Public Employees, Local 1582 (the Union), is the bargaining agent for all full-time and part-time staff at the Library, save and except those employed in managerial positions.

5. *The Municipality of Metropolitan Toronto Act*, R.S.O. 1980 c.314 as amended, sets out the structure and responsibilities of the Corporation of the Municipality of Metropolitan Toronto (Metro). Metro is a second tier level of local government for the Metropolitan Toronto area; this area includes the Borough of East York, the City of Etobicoke, the City of North York, the City of Scarborough, the City of Toronto and the City of York. Metro councillors from each ward in the Metro area are elected to Metropolitan Council.

6. Metro provides a wide range of services to the residents of Metro which include planning, roads and traffic, water, community services, ambulance services, policing, refuse disposal, public transit, a zoo, and the public reference library. These services are delivered by 14 departments and 13 agencies, boards, and commissions of the Metro Corporation. It is the relationship between Metro and one of these boards, the Metropolitan Toronto Library Board, that is the issue in this case.

7. The Metropolitan Toronto Library Board (Library Board) is a "local board" of Metro and its existence and structure are defined pursuant to Part IX of the *Municipality of Metropolitan Toronto Act*. The Library Board is a Corporation composed of the Chair of Metro Council or his or her designate, one person appointed by each of the six area municipalities, an appointee of the Metropolitan School Board, an appointee of the Metropolitan Separate School Board, and two persons appointed by Metro Council. The *Act* provides that each year the Library Board submit to Metro Council an estimate of its financial requirements for the year. Metro Council may amend

such estimates; it pays the Library Board such amounts as may be requisitioned from time to time out of the monies appropriated for the Library Board. The Library Board requires the approval of Metro Council to acquire, lease or dispose of property, to erect, maintain and repair buildings, or to alter such buildings. The Library Board may sue or be sued in its own name.

8. Although the Library Board is also governed by the *Public Libraries Act, 1984* S.O. 1984 c.57 and is deemed to be a special library service board under this *Act*; for the purposes of this case, the more specific provisions of Part IX of the *Municipality of Metropolitan Toronto Act* prevail.

9. It was the position of Metro and of the Library Board that the Library Board is an autonomous entity with the power and responsibility to run the Library. They contended that the only link with Metro is that Metro funds the annual appropriations for the Library Board, a one line budget item in Metro's annual budget. Metro and the Library Board maintained that the Library Board was free to spend its funds within its annual appropriation. Their position was that Metro simply acted as paymaster for the Library Board and that Metro had no control over the operations of the Library.

10. In determining who is the employer, the Tribunal starts with the applicable statutes; we then go beyond the formal provisions of the statutes to examine the realities of the relationship between Metro and the Library Board to determine, for pay equity purposes, who has fundamental control over the staff at the Library Board *Bagby v. Gustavson International Drilling Co. Ltd.* (1980), 24 A.R. 181 (Alta. C.A.) at p. 201; *Manley Inc. v. Fallis* (1977), 2 B.L.R. 277; 38 C.P.R. (2d) 74 (Ont. C.A.) at p.279.

WHO IS THE EMPLOYER?

11. The term "employer" is not defined in the *Pay Equity Act, 1987*. Courts and other tribunals have developed diverse criteria to define employer under other statutes, depending on the issues in dispute and the legal context. For example, under the *Income Tax Act* "employer" is determined by considering who is responsible for the payment of salary or wages (sections 153(1) and 248(1)); *In re Bankruptcy of G. & G. Equipment Co. Ltd.* (1973), 74 D.T.C. 6407 (B.C.S.C.). In disputes concerning whether an employer is responsible in law for the negligent acts of an employee, the courts have used a four-fold test: (1) control; (2) ownership of tools; (3) chance of profit; (4) risk of loss *City of Montreal v. Montreal Locomotive Works Limited*, [1946] 3 W.W.R. 748 (P.C.) at p.756. This test has not been adopted by tribunals dealing with employment and labour relations matters, but instead these tribunals have developed criteria which are of greater assistance in employment cases. The following criteria have been considered in determining who is the employer by the Ontario Labour Relations Board:

(1) The party exercising direction and control over the employees performing the work...

(2) The party bearing the burden of remuneration...

(3) The party imposing the discipline...

(4) The party hiring the employees...

(5) The party with the authority to dismiss the employees...

(6) The party who is perceived to be the employer by the employees...

(7) The existence of an intention to create the relationship of employer and employee...

York Condominium Corporation, [1977] O.L.R.B. Rep. Oct 645 at p.648.

12. The term "employer" should take its meaning from the purpose and context of the statute under consideration, in this case, the *Pay Equity Act, 1987*, *Cormier v. Alberta Human Rights Commission et al.* (1984), 85 C.L.L.C. 16,018 at p. 17,003 (Alta. Q.B.); *R. v. Pereira* (1988), 20 C.C.E.L. 187 (Alta. Q.B.). Tests or criteria to determine who is the employer must be developed which are consistent with the purpose of the *Pay Equity Act, 1987* and which fit in the context of the statute.

13. The purpose of the *Pay Equity Act, 1987* is to redress systemic gender discrimination in compensation for work performed by employees in female job classes (section 4(1)). The Preamble sets out the goal of this *Act* as affirmative action to redress gender discrimination.

14. The Courts have described discrimination as a distinction whether intentional or not, based upon grounds relating to personal characteristics of the individual or group. Such a distinction may impose burdens, obligations, or disadvantages on such individuals or group not imposed upon others, or withhold or limit access to opportunities, benefits, or advantages available to other members of society *Andrews v. Law Society of British Columbia* (1989), 36 C.R.R. 193 (S.C.C.) at p.228.

15. The Supreme Court of Canada has accepted the approach to systemic discrimination found in the Abella Report on equality in employment. Judge Abella said:

> Discrimination ... means practices or attitudes that have, whether by design or impact, the effect of limiting an individual's or a group's right to the opportunities generally available because of attributed rather than actual characteristics.
>
> ... It is not a question of whether this discrimination is motivated by an intentional desire to obstruct someone's potential, or whether it is the accidental by-product of innocently motivated practices or systems. If the barrier is affecting certain groups in a disproportionately negative way, it is a signal that the practices that lead to this adverse impact may be discriminatory.
>
> ...
>
> This is why it is important to look at the results of a system.

Report of the Commission on Equality in Employment Judge Rosalie Abella, Commissioner October, 1984 at p.2; *Canadian National Railway Company v. Canadian Human Rights Commission* (1987), 87 C.L.L.C. 16,255 (S.C.C.) at p.17,022. Moreover, the Court said that to combat systemic discrimination, it is essential to create a climate in which both negative practices and negative attitudes are discouraged. The Abella Report stated that remedial measures of a systemic and systematic kind are the object of employment equity and affirmative action. They are meant to improve the situation for individuals who, by virtue of belonging to and being identified with a particular group, find themselves unfairly and adversely affected by certain systems or practices *Abella Report*, Supra at p.9.

16. Having reviewed these discrimination cases, the mandate of the *Pay Equity Act, 1987* to remedy systemic discrimination in compensation, is specific and different from the legal context in which the four-fold test was developed. The criteria used to determine vicarious liability are not helpful in determining who is the employer in the context of pay equity. Moreover, the test of ownership of tools, chance of profit, risk of loss are of no assistance to the Tribunal in determining who is the employer in this public sector case.

17. It was the Library Board's position that the employer in the pay equity context must be defined as the entity that is the party to the collective agreement. Counsel for the Library Board submitted that there is a close and consistent interweaving of labour relations and pay equity concepts. It was his position that the drafters of this legislation intended that the pay equity employer would be the collective bargaining employer. Counsel stated that if the Tribunal named a non-collective bargaining entity as employer, it would do violence to the *Pay Equity Act, 1987* and would give the *Act* a shape it was never intended to have. He stated that to inject Metro into the pay equity negotiations at the Library would do violence to the labour relations reality, as it is the Library Board, not Metro, which is bound by the collective agreement with the Union.

18. Counsel for the Library Board further contended that the employer for pay equity purposes must be the entity that has the power to hire and fire library workers in order that the various sections of the *Pay Equity Act, 1987* are consistent. It was his submission that, in a case where the Tribunal decided that a library worker had been dismissed, contrary to section 9(2) of the *Act*, the Tribunal would be limited to ordering the pay equity employer to reinstate this employee. It was the Library's position that if such an order were made against Metro, it would be unenforceable, as the Library Board, not Metro, has the power to hire library workers. He wished the Tribunal to conclude that the entity which has the power to hire and fire under the collective agreement must be the pay equity employer.

19. It was the Library Board's position that negotiating a pay equity plan involves exchanging information and making comparisons between jobs. It is the parties to the collective agreement that establish the jobs, the rankings, and the compensation structure for the bargaining unit. Counsel said that only the Library Board has this information and that only the Library Board can intelligently and fairly analyze the jobs at the Library. Once a pay equity plan is negotiated, the adjustments are incorporated into the collective agreement. The only parties able to enforce the pay equity adjustments and to maintain pay equity are therefore the parties to the collective agreement. Their position was that the only possible employer for pay equity purposes must be the Library Board.

20. The Tribunal rejects the assertion that the employer for pay equity purposes must be the employer named in the collective agreement. Whereas the *Act* defines "bargaining agent" with specific reference to the *Labour Relations Act*, R.S.O. 1980 C.228 as amended, there is no parallel reference for "employer". In many fact situations the two employers will coincide. In other fact

situations a different employer may be more appropriate in the pay equity context. Where there is a dispute, it falls to the Tribunal to determine, for pay equity purposes, who is the employer of those in dispute. The Tribunal will consider, but is not limited by, the parties named in the collective agreement.

21. The employer for pay equity purposes and the bargaining agent are responsible for negotiating both the job comparison system and the pay equity plan for the bargaining unit. Both are responsible under the *Pay Equity Act, 1987* for the process and the content of the negotiations. It is the adjustments to compensation that flow from the plan that are incorporated into the collective agreement, and not the pay equity plan itself (s.13(10)). There is an ongoing responsibility to maintain pay equity, which lies outside the collective agreement, and is given by law to the pay equity employer and to the bargaining agent (section 7). In negotiating future collective agreements, the parties to that agreement must negotiate compensation rates that are consistent with pay equity. To decide a pay equity employer different from the collective agreement employer does no violence to the *Pay Equity Act, 1987*, but rather may be more effective in remedying systemic discrimination in the organization of the workplace. Pay equity plans will affect the compensation rates in the collective agreement and future collective agreements must be negotiated in such a way as to maintain pay equity. To look at the Metropolitan corporation as a whole may require a re-examination of the traditional collective bargaining relationships in order to fulfil the mandate of the *Act*.

22. The Tribunal is not prepared to find that the pay equity employer must be the entity which has the power to hire and fire under the collective agreement. The focus of this *Act* is compensation, not the control over or exercise of the power to hire and fire. These rights continue in the collective agreement. Nonetheless, counsel for the Library Board asked the Tribunal to address the hypothetical question: against whom would reinstatement be enforced in the event that an employee were dismissed contrary to the *Act*? As this issue is not before this panel, we do not feel that it is necessary or helpful to answer in this case. Put another way, what the Library Board has asked us to do is to interpret section 25(2)(b) in the absence of any facts. It is not clear that section 25(2)(b) should be interpreted in the manner suggested by counsel for the Library. For example, the section provides a remedy for the violation of section 9(2). This section applies to the employer or anyone acting on its behalf. It may well be that even if Metro were found to be the employer for pay equity purposes, it may be held responsible for the dismissal of an employee contrary to this *Act*. Moreover, the Tribunal may find it helpful to refer to other jurisprudence, including the common law of agency, or decisions of the courts, labour boards, or human rights tribunals, in answering the question of liability and in fashioning appropriate and effective remedies. As the jurisprudence of pay equity is evolving, the issue of liability raised by counsel for the Library ought not to be determined without a factual basis nor without the benefit of submissions based on actual facts.

23. In the alternative, it was the position of the Respondents that the Tribunal should use the same criteria as developed by the Labour Board to determine who is the employer. The purpose of the *Labour Relations Act* is to further harmonious relations between employers and employees by encouraging the practice and procedure of collective bargaining between employers and trade

unions as the freely designated representatives of employees. The Labour Board cases which have developed the criteria for who is the employer have done so in the labour relations context and to promote the purpose of that *Act*. The *Pay Equity Act, 1987* was enacted to remedy the effects of systemic wage discrimination including those effects that have resulted from the labour relations context. It would be inappropriate for the Tribunal to adopt the criteria developed by the Labour Board for determining who is the employer, without considering whether the criteria are applicable in the context of pay equity and whether they are consistent with the purpose of the *Pay Equity Act, 1987*. This statute, which is an affirmative action plan to remedy systemic discrimination in compensation, is remedial in nature. Its aim is to identify and eliminate discrimination including systemic discrimination which has arisen out of the traditional labour relations and collective bargaining processes. The *Act* requires a review of the current compensation practices in existing collective agreements and positive steps within a timetable to remedy systemic discrimination. The remedies must be effective and consistent with the anti-discriminatory nature of the *Act*, *Robichaud v. Canada (Treasury Board)* (1987), 8 C.H.R.R. D/4326 (S.C.C.) at p. D/4331. The Tribunal has decided to develop criteria which will effect the purpose of the *Pay Equity Act, 1987*, rather than to adopt those used by the Labour Board.

24 . In its decision in *Regional Municipality of Haldimand-Norfolk* dated June 30, 1989 [now reported as *Haldimand-Norfolk (No.3)* (1989) 1 P.E.R. 16], the Tribunal set out four tests or criteria to be applied when approaching the question of who is the employer. The Tribunal did not intend these tests to be exhaustive. As with any new statute, interpretation must be approached in an incremental fashion, having regard to the possibility that future cases may refine these tests. The criteria which the Tribunal in that case found useful to apply were:

> 1. *WHO HAS OVERALL FINANCIAL RESPONSIBILITY?*
>
> Indicia of this test include: Who has responsibility for the budget? Who bears the financial burden of compensation practices, and the burden of wage adjustments under the *Act*? Who is responsible for the financial administration of the budget? What is the shareholder investment or ownership? Who bears the responsibility of picking up the deficit or benefiting from the surplus?
>
> 2. *WHO HAS RESPONSIBILITY FOR COMPENSATION PRACTICES?*
>
> The indicia for this criteria include: Who sets the overall policy for compensation practices? Who attaches the value of a job to its skill, effort, responsibility and working conditions? What is the labour relations reality, who negotiates the wages and benefits with the union or sets the wage rate in a non-unionized setting?
>
> 3. *WHAT IS THE NATURE OF THE BUSINESS, THE SERVICE OR THE ENTERPRISE?*
>
> Within this test the following are helpful indicia: What is the core activity of the business, service or enterprise? Is the work in dispute integral to the organization or is it severable or dispensible? Who decides what labour is to be undertaken and attaches that responsibility to a particular job? What are the employees' perceptions of who is the employer?
>
> 4. *WHAT IS MOST CONSISTENT WITH ACHIEVING THE PURPOSE OF PAY EQUITY ACT?*
>
> If there is more than one possible employer, it assists the Tribunal in its determination to make reference to the purpose and objectives of the *Pay Equity Act, 1987*.

25. It was the position of the Respondents that this panel was not bound by the decision of another panel in the *Haldimand-Norfolk* case and further, that we should not follow that decision, as it was wrongly decided.

26. The *Pay Equity Act, 1987* is a new statute with application to a broad range of employers, employees, and trade unions, all of whom must complete the pay equity process within the timelines set by the statute. There is very little jurisprudence from other jurisdictions to assist the parties in interpreting and applying this *Act*. Therefore, one of the goals of this Tribunal is to provide decisions and reasons which not only determine the issues between the parties but also assist other parties to meet their obligations under the *Act*. Although in law, one panel of a Tribunal is not bound by the decisions of another panel, both are panels of the same Tribunal. Decisions of the panels are decisions of the Tribunal. Employers, employees and trade unions are entitled to uniformity and certainty in the interpretation and the application of this statute. Consistency in the Tribunal's decisions will provide certainty and direction to the parties, will assist them in negotiating pay equity plans, will promote settlement of similiar issues, and will discourage multiplicity of proceedings *Blake and Amalgamated Transit Union and the Crown in Right of Ontario (Toronto Area Transit Operators Authority)*, Grievance Settlement Board #1276/87 decision dated May 3, 1988; *Consolidated Bathurst Packaging Ltd.*, [1983] O.L.R.B. Rep. Dec. 1995 at par.6. On the other hand, the jurisprudence in pay equity is evolving. The Tribunal is not persuaded that *Haldimand-Norfolk* was wrongly decided. Moreover, this decision has been recently upheld by the Divisional Court (decision released November 23, 1989). The four criteria set out in that case for determining who is the employer are appropriate to be used in this case.

27. In the alternative, the Respondents submitted that the Tribunal should add a fifth test to the criteria set out in *Haldimand-Norfolk*. The proposed criterion, who has fundamental control over the working lives and the working environment of those in dispute, is the test used in labour relations disputes to evaluate which criteria in a given set of circumstances, are most indicative of an employer/employee relationship *Kennedy Lodge*, [1984] O.L.R.B. Rep. July 931 at p.957; *Sutton Place Hotel*, [1980] O.L.R.B. Rep. Oct. 1538 at p.1552.

28. In *Sutton Place Hotel*, the Labour Board reconciled or balanced the seven criteria set out in *York Condominium* by reviewing and considering the purposes of the *Labour Relations Act*; in *Kennedy Lodge* it asked the question: "for the purposes of labour relations, who has fundamental control over those in dispute?"

29. The criteria in *Haldimand-Norfolk* were developed to determine "for the purpose of pay equity, who has fundamental control over those in dispute". The Tribunal reconciled or balanced the first three criteria by reviewing and considering the purposes of this *Act* in a way analogous to the review or consideration given by the Labour Board in *Sutton Place Hotel*. In other words, the fourth criterion in *Haldimand-Norfolk* is meant to be used by the Tribunal to evaluate which of the first three criteria, in a given set of circumstances, are most indicative of the employer/employee relationship. If the application of the first three criteria clearly point to an entity as the employer, resort to the fourth criterion may not be necessary. It will be used then, to reconcile or balance the first three criteria if their application leads to different entities as possible employers in a particular fact situation.

30. The Tribunal is not persuaded to add the criterion proposed by the Library Board as it is not substantively different from either the approach in *Haldimand-Norfolk*, or the approach outlined by the Labour Board in *Sutton Place Hotel* and *Kennedy Lodge*.

THE FACTS:

31. The Tribunal heard evidence concerning the relationship between Metro and the Library Board in the following areas: budget, labour relations, financial accountability, and operations.

BUDGET:

32. Metro has a centralized process for determining the budgets of departments, agencies, boards, and commissions of Metro. The budget review process is very detailed and includes a thorough analysis of the programmes and services provided by each of these entities. The process of formulating, analysing and approving the budget is a highly political process because the net funding required by the Metro Corporation is financed through the general tax levy. Metro Council, which ultimately approves the spending levels of each department, agency, board and commission, is accountable for the services provided and for ensuring that the taxpayer receives value for dollars spent. Various subcommittees of Metro Council and ultimately Metro Council recommend the appropriate funding requirements of each agency and the management actions which are to be taken for the coming year.

33. The Library Board is required to follow the same budget process as every other department, agency, board and commission of Metro. The budget process has two components: capital expenditures and operating funding.

34. The Tribunal heard the evidence of Shekhar Prasad, the Director of the Budget Analysis and Internal Control Division of the Treasury Department of Metro. Mr. Prasad is responsible for processing and co-ordinating the operating and capital budgets for the Metropolitan Toronto Corporation. He has been involved with the Library Board budget since 1978. The Tribunal found Mr. Prasad to be a well informed, forthright and credible witness concerning the budget process of Metro and the Library Board. Wherever there were conflicts in the evidence, the Tribunal has accepted his evidence.

35. Mr. Prasad said that the primary purpose and focus of the Metro budget process is to provide analytic support to the politicians who have the responsibility for controlling the purse strings. As politicians must answer to the taxpayers for any tax increases, they must be able to justify the reasonableness of the expenditures and the level of services provided by the departments, agencies, boards and commissions of Metro. If Metro did not have such an analytic process, the politicians would be limited to blunt instruments such as across-the-board increases, or edicts such as "there will be no new programmes". The politicians decide what level of tax increases they are prepared to support. The budget process provides the politicians with the necessary information to allocate funds to different programmes based on the current political priorities. In 1989, Metro's basic tax levy was $800 million.

36. Each summer, Mr. Prasad sends a Budget Manual to each department, agency, board and commission of Metro, to enable them to prepare their capital and operating budgets for the next year. The manual of instructions sets out how the budget is to be prepared, Metro's estimate for inflation in costs for commodities and services, and a timetable for completion of the budgetary approval steps. The covering letter asks for 30 copies of the proposed budget to be delivered by early November so that Metro's composite budget can be presented to Council by mid-November.

37. The Treasurer and Manager of Financial Services for the Library Board receives this request each year. Each manager in the library is asked to prepare his or her projections for the next year and to justify any requests for additional funds and new programmes. These requests are reviewed by the senior management of the Library and revisions are made. The requests are consolidated and reviewed by the Director of the Library to ensure that the requests are reasonable. The budget request is then presented to the Library Board for discussion and approval. The 1989 Operating Budget for the Library was $22 million. With revenue of $3.874 million, the net cost to Metro was $18.284 million. Metro provides 88 percent of the funds for the Library Board; 8 percent comes from the Province of Ontario by way of grants for special projects such as the Literacy Programme; and 4 percent comes from internally generated funds, largely photocopy revenue.

38. The budget request for the Library Board is a detailed and thorough analysis of the planned expenditures, new programmes and services for each year and a cost justification of each item. The Library prepares a New Equipment Listing and Justification Report to seek permission to purchase even small items such as ladders or a calculator for $100.00. Each proposed new programme must be described and justified in terms of a cost-benefit analysis. The Library reports to Metro on its establishment and staff strength for both the current year and the next year. This staffing report includes positions vacant, positions to be filled, and requested positions to be added. Salary costs are provided for the budget year and on an annualized basis from information generated by the Library Board; the expected dates of employment and the justification for all new positions are set out. The Library must report to Metro on all other labour costs including overtime, temporary staff, planned reclassifications and gapping. Gapping is an arithmetic goal or target, expressed as a percentage of total salary dollars, which represents the savings expected as a result of the time period between staff leaving positions due to retirement, resignation, illness or maternity leave and persons being hired to fill these vacancies. On one hand, gapping can and does occur naturally due to staff turnover. On the other hand, the Library Board can choose to gap positions in order to decrease salary costs. It is clear that the gapping target set during the budget process has an impact on the staff, either by reducing the level of service to the public or by distributing the same amount of work among fewer employees. Finally, pay equity adjustments for library workers will be included in the 1990 budget process.

39. When the Library Board has a collective agreement which spans the budget year, the negotiated salaries are used as the basis for budgetary projections. If the collective agreement is still to be negotiated, the Library lists the current salaries in the budget. In addition, the Treasurer of the Library discusses with Mr. Prasad what the projected salary increases are likely to be. Mr. Prasad

will have had consultations with Metro's Personnel Department to get their best estimate of what Metro's labour negotiations are likely to result in and this information is shared with the Library. The agreed-to amounts are set aside in Metro's corporate contingency account. When the collective agreement is settled, the Library Board asks Metro Council for authorization to draw down the required amount from the contingency account. Metro Council has always approved such requests. Mr. Prasad testified that it was possible for the Library Board to settle a collective agreement for salaries in excess of the funds set aside in the contingency account. Although this has never happened at the Library Board, Mr. Prasad testified that it had happened at the Police Commission. Metro Council approved the transfer of these amounts because there were sufficient funds in the corporate contingency account to accomodate this request.

40. Each department, agency, board and commission of Metro is required to establish a list of Programme Priority Reductions. The Library Board lists the programme expenditures the Board is prepared to cut from their budget request in reverse order of priority. For example, in 1989 the Library listed as the fourth item the provision of audio visual staff on Saturdays. The total of the items on this list must reduce the budget request by five percent or bring the budget request below the appropriation for the previous year. The purpose of this exercise is to permit the Library staff and Metro staff to effectively analyze the budget requests.

41. The Library Board forwards its budget request to the Budget Analysis and Internal Control Division of Metro. This Division reviews all budgets, keeping in mind Metro Council's guideline, that the mill rate for a given year should not exceed the inflation rate. Although this guideline is exceeded in some budget years, any increase greater than the inflation rate must be justified politically.

42. A budget analyst is assigned by Metro to review the Library's budget. The Library Board characterized this review as checking the arithmetic and the accounting assumptions. The Tribunal does not agree that this characterization accurately captures the nature or extent of the budget review process. The budget analyst sits down with the Library staff and goes over the budget requests and prepares a draft report that analyzes the request and the explanations given for the increases. For example, any unusual increase above and beyond inflation is singled out as are any new programme initiatives. Most often consensus is achieved, although on occasion both sides have maintained their positions on certain items. The budget analyst sends a draft of his report to the Library staff. After receiving comments, the report is given to the member of Metro's Management Sub-Committee who is responsible for the Library budget. That person is a Metro Councillor, at present Anne Johnston. The report contains the recommendations of the budget analyst to modify the Library's proposed budget.

43. An internal review meeting is held with the member of Management Sub-Committee, senior Library staff and the budget staff of Metro. The Chairman of the Library Board attends these meetings along with the budget analyst, the Assistant Director and the Director of Metro's Budget Division, and the Chief Administrative Officer for Metro. The purpose of the meeting is to prepare the Management Sub-Committee member's report. At the meeting, issues in dispute are discussed

at great length. This is an opportunity for the Library staff to make their submissions directly to the politican, the Management Sub-Committee member. It is then the member's decision to go either with the budget analyst's recommendations or with the Library staff's request, or to compromise. After the meeting, the budget analyst prepares a report for the Management Sub-Committee meeting based on the member's decisions about outstanding items. The report is then approved by the member.

44. The member's report concerning the budget for the Library goes next to Management Sub-Committee, a sub-committee of Executive Committee of Metro made up seven Metro Councillors. Reports are received from all departments, agencies, boards and commissions of Metro. The task of this Committee is to establish the funding level for the whole corporation. This is a public meeting which Library Board staff attend. The Metro Councillor presents the Library budget and her recommendations. In the normal course, Management Sub-Committee approves the reports of its members and forwards the report to Executive Committee of Metro which establishes the funding level for the Metro Corporation. Executive Committee reviews the recommendations of Management Sub-Committee and prepares a consolidated report which pulls together the reports of all the Management Sub-Committee members for each of the departments, agencies, boards and commissions of Metro. Again, meetings of Executive Committee are public and the Library Board attends. Finally, the budget goes to Metro Council which reviews the report of Executive Committee. Metro Council adopts this report as Minutes of Council. Metro's appropriation for the Library Board is the net cost of library services. That is the bottom-line amount over which Metro actually has control. The Library Board cannot overspend this amount without getting Metro Council's authority.

45. The Metro budget staff, the member of Management Sub-Committee, and the Library Staff try to reach consensus on the programmes and services proposed in the budget, which is usually achieved. The Tribunal heard evidence of three significant disputes between the Library and Metro in the budget process. The first occurred in 1981 in which the Management Sub-Committee member recommended cuts of approximately $1.2 million to the Library budget. The Library staff felt very strongly about the nature and level of these cuts. Both sides stuck to their respective positions and no compromise was reached. The Library Board attended at the Management Sub-Committee meeting and made a presentation to that committee. Nevertheless, the committee upheld the member's report. The Library Board then attended at the Executive Committee meeting to make further submissions concerning their budget. Executive Committee rejected those submissions, upheld the report of Management Sub-Committee and forwarded it to Metro Council. The Library Board lobbied members of Metro staff and Metro Councillors extensively before the budget went to Metro Council. Metro Council added $417,000.00 back into the Library budget. As a result of this lobbying, the Library Board was able to restore one-third of the proposed budget cuts.

46. The Director of the Library, Frances Schwenger, testified that in 1983 the Management Sub-committee member arbitrarily removed $100,000.00 from the Library budget. The Library

staff strongly opposed this move but were unsuccessful in effecting change and were required to re-allocate money internally to accommodate this further reduction to their budget.

47. In 1987, the Management Sub-Committee member decided on his own initiative to require the addition of $50,000.00 to the revenue portion of the Library's budget by raising the photocopy rates. The Library staff had no notice of this proposal and strongly objected. Despite these objections, the Metro Councillor took the position that he wanted it and that he would put it in his report. His report went forward to Management Sub-Committee with this item included. Both the Treasury staff of Metro and the Library staff concluded that this was an impractical recommendation. A compromise was reached in which the Library did not have to raise the extra $50,000.00 in photocopying revenue, but its expenditures were reduced by $50,000.00. Management Sub-Committee amended the member's report to reflect the compromise.

48. In summary, it is clear that Metro is more than a source of funds for the Library Board. The nature and extent of the budget process demonstrates its close control over the programmes and services offered by the Library Board. Metro reviews and approves staffing decisions such as adding new staff, reclassifying staff, and gapping. The Tribunal was provided with the budget documents from 1981 to 1989. Every year, Metro Council sets the appropriation level for the Library Board at substantially less than the budget requested by the Library. During the budget process, the Library Board is required to explain and justify its programmes, services and proposed expenditures. The budget analyst and the Management Sub-Committee member can and do choose amongst the programme priority reductions set by the Library Board. The budget process is generally done by consensus, a reality no doubt attributable to the negotiating skills of the parties. At the same time the reality is that the process is highly political and the ultimate determination of the budget is made by the politicians.

49. Metro Council approves an appropriation to the Library Board, a single figure which represents the net cost to the Metro Corporation of the Library's programmes and services. The politicians have, in theory, greater scrutiny over department budgets because Metro Council approves separate appropriations for their different programmes. However, the evidence is that the level of scrutiny of the Library budget during the budget process is so detailed as to make this distinction meaningless. Therefore, it is Metro which exercises fundamental control over the Library's budget.

LABOUR RELATIONS:

50. The Union has negotiated successive collective agreements with the Library Board. The collective agreements are signed by the Library Board, and not by Metro. In the collective agreements the Union recognizes that the Library Board, as employer, has the exclusive right to hire, fire, and discipline employees; classify jobs and manage the operations of the Library. It is not disputed that the Library Board has these powers and exercises them. Metro plays no role in these functions. Although both the Library and Metro are organized by locals of the Canadian Union of Public Employees, there is no interchange of employees from the Library to Metro, nor from Metro

to the Library. Library Board employees are considered external candidates for Metro jobs. The collective agreement at the Library has similarities with the collective agreements at Metro, but there are also differences. The Library has its own personnel department and retains separate legal counsel to represent the Library with respect to labour matters. It was the position of the Respondents that the Library is separate and independent of Metro with respect to labour relations. The Director of the Library, Frances Schwenger testified that Metro played no role in the Library's labour relations; the Library Board ran its own show. In contrast, it was the Union's position that although Metro was not at the bargaining table, the presence and control of Metro was felt throughout the collective bargaining process.

51. It was the Union's position that in salary negotiations the Library Board followed Metro's negotiations with its unions. Two union negotiators, Risa Pancer and Judy Darcy testified that in all the rounds of collective bargaining since 1979, the Library Board did not table its monetary proposal until after Metro had settled with its unions. Ms. Pancer testified that the union was told that the Library could not do so earlier, because "the tail could not wag the dog". It was the evidence of the Union that the Library workers received exactly the same settlement as the Metro employees in every year of collective bargaining since 1979, with three exceptions. In 1980, after a short strike, the Library employees negotiated a $200 lump sum payment to offset the lost earnings during the strike. The Union negotiated a cash equivalent instead of the improved dental rider negotiated by the unions at Metro in 1981. The 1989 settlement gave Library workers a .75 per cent increase in salary above that negotiated by Metro's unions. The wage increases for 1990 and the wage re-opener provisions are identical for all three unions.

52. Beginning in 1982, the Union at the Library tabled proposals to reduce the work week for some of its members from 40 hours to 35 hours. Local 43 of the union had put forward the same demand to Metro in the same year. Negotiators for the Library Board said that when Metro agreed to the shorter work week, the Library Board would agree. The same issue arose during the 1988 round of collective bargaining. Judy Darcy testified that Mr. LeForte, the Personnel and Labour Relations Manager of the Library, said that the Library did not have the "authority" to grant this demand until it was granted to Locals 43 and 79 of Metro. Mr. LeForte was not called as a witness.

53. Risa Pancer testified that the negotiators for the Library Board advised the Union that any negotiated settlement with the Library would have to be checked for content and language by the legal department of Metro. This was denied by the Library Board and by Metro. Nonetheless, the minutes of the Summer Executive Committee of the Library Board dated August 5, 1982, state that "the Chairman [of that Committee] be asked to endorse the official contract documents, pending official ratification by the Metro Corporation legal authorities".

54. In 1984, the Union and the Library Board were embroiled in bitter and protracted labour negotiations. After five months of bargaining, the union went on strike on October 1. The union mounted a campaign to put public pressure on the Library Board to change its negotiating positions. The Library workers lobbied Metro councillors to inform them of the issues, to get Metro Council to put pressure on the Library Board, and to get Metro to intervene in the Library negotiations. The

Union met with Metro councillors and on October 23, 1984, Metro Council passed a resolution requesting the Library Board to resume bargaining immediately. The Metro Chairman was requested to report back to the Executive Committee on the progress of the Library negotiations. Council also asked Management Subcommittee to review all the collective agreements of the agencies, boards and commissions of Metro to establish common non-monetary practices for all Metro employees.

55. After the motion on October 23, 1984, two meetings were held by the Metro Chairman concerning labour relations at the Library. The first was with the Chairman of the Library Board. The second, held a week later, was with counsel for the Library Board. Peter Ferguson, the Commissioner of Personnel for Metro, attended both meetings. He explained that the purpose of the meetings was to enable the Metro Chairman to gain information about the strike so that he would be able to report to Metro Council that he had met with the Library and was aware of what was going on. Mr. Ferguson testified that there was no direction given to the Library Board concerning the strike or the negotiations. The strike ended on November 9, after the Library Board removed most of its demands from the bargaining table and agreed to a monetary settlement which was the same as the settlement agreed to between Metro and its unions.

56. After the strike was settled, the Chief Administrative Officer of Metro, John Kruger, was asked by Management Sub-committee to review the collective agreements of the agencies, boards and commissions of Metro to establish common non-monetary practices for all Metro employees. The Metro Solicitor gave his opinion that the main areas of control that Metro has over these entities are Metro's appointment of members to their boards and Metro's provision of funds. Otherwise, these are autonomous bodies and, should Metro attempt to control their day-to-day actions and methods, it would probably be exceeding its jurisdiction. Despite this legal opinion, Mr. Kruger asked the Personnel department of Metro to review the thirteen collective agreements of the agencies, boards and commissions of Metro, including that of the Library Board. Mr. Kruger recommended that the Library Board be brought into the mainstream of Metro's collective agreement bargaining process, not from the perspective of Metro dictating to the Library so much as the Library's staff being aware of trends in the total Metro system. In addition, Council adopted the recommendation that once each year the senior staff administrator, together with the appropriate personnel staff of each agency, board or commission of Metro, meet with the Chief Administrative Officer of Metro and the Commissioner of Personnel to exchange information on general working conditions and collective agreements, in an attempt to have consistency, wherever appropriate, in the respective collective agreement clauses. In addition, prior to the commencement of bargaining, each agency, board or commission staff should consult with the Metro Commissioner of Personnel to identify any particular problem. There were two such meetings held in 1985 and 1986 to exchange information. Peter Ferguson testified that the collective agreements were so different that it was not useful to continue meeting. No further meetings have been held.

57. The Tribunal has concluded that although Metro does not attempt to direct the day-to-day labour relations at the Library, Metro influences the conduct and content of collective bargaining

for the Library. This influence may not be so much the result of Metro directing the activities of the Library, but rather, the Library conducting itself at all times so that the Library Board follows Metro with respect to collective bargaining and never leads. Perhaps it was best summed up in the phrase "the tail must not wag the dog".

FINANCIAL ACCOUNTABILITY

58. As noted above, Metro approves a single appropriation amount for the Library Board. It is the position of the Respondents that the Library Board is free to move money from one programme to another, to hire additional staff, and to add new programmes during the year so long as its total expenditures do not exceed its appropriation. The Library Board, as all other departments, agencies, boards, and commissions of Metro, must prepare quarterly variance reports which document the differences between projected and actual spending for each programme. The Respondents note that Metro receives these reports after the money has been spent and therefore is in a position to monitor what has happened but not to control what will happen. Finally, Metro receives the benefit from any surplus at the Library.

59. The Library Board can and does spend money in programmes other than what has been budgeted. This occurs because budgets are estimates for the coming year, and circumstances may change requiring modifications to programmes and services. But the Library is not free to take money from Metro for a particular project and then use it for an entirely different purpose without justifying this shift. For example, if the Library Board decided to hire additional permanent staff during a budget year, it would have to report and account for this decision to Metro during the next budget process. Moreover, Metro would have to approve the funding of these positions on a full year permanent basis. The Library staff prepares monthly variance reports outlining changes in spending plans together with explanation. These are attached to the agenda of Library Board Meetings. Copies of the agenda and attachments are sent to the Treasury Department of Metro and reviewed by the budget analyst. Mr. Prasad testified that this information is sent so that Metro can stay on top of the Library budget. Should something concern the budget analyst, she or he is free to attend the Library Board Meeting. To date the analyst has not attended any meetings. The Tribunal finds that the Library Board is accountable for its finances within the same political process as exists for budget allocations. Deviations from programmes and services must eventually be justified. Therefore, in practice, Metro has substantial control over the operation of the Library Board.

60. The extent of Metro's control is best illustrated by the events of 1981 when the Library Board overspent its $13 million budget by $281,000. The Library Board requested that additional funds be drawn from Metro's Corporate Contingency Account to cover the deficit. Metro Council was not pleased. Council approved the Library's request but directed the Management Services Department of Metro to prepare guidelines for the Library Board's financial reporting to Metro. The guidelines provide:

> 1. The Library Board's estimates should be prepared according to the guidelines issued by The Metropolitan Corporation.

2. An overrun in one programme cannot be offset by an underrun in another programme (Library Board's internal accounts) unless approved by the Library Board and the information conveyed to the Budget Sub-Committee member via the Management Services Department.
3. No excess of actual revenue over estimated revenue may be used by the Library Board to fund additional expenditure requirements without Budget Sub-Committee approval.
4. Any planned expenditure during the year for a programme not included in the budget must receive prior approval of the Budget Sub-Committee.
5. Any increase in the approved net expenditure level must receive specific Metro Council approval prior to being incurred.
6. The Director should submit a monthly variance report with explanations on the current and projected total year financial position of the Library to the Board of Directors and include a list of action(s) required to ensure that the Metropolitan Corporation Financial guidelines are not compromised.
7. Financial reports on the status of Library Board's operation should be submitted on a quarterly basis to the Management Services Department for review and forwarding to the Budget Sub-Committee member responsible for The Metropolitan Toronto Library Board.

Mr. Prasad was asked the status of these guidelines. He testified that whereas in theory the Library Board could have disregarded these guidelines, practically it was to their advantage to follow them as the Library would be coming to Metro each year for funding. Mr. Prasad said that it is better for the Library to keep a mutually beneficial relationship with Metro and the Library had seen it that way as well. These guidelines, issued in 1982, are still in effect today. Mr. Prasad testified that the goal of Metro Council is to control the appropriation and to be advised of changes before rather than after the fact. These guidelines are a monitoring process and help to achieve this goal. Such guidelines do not exist for every agency, board and commission of Metro, but appear to be put in place when an agency overspends its budget.

61. The Guidelines are sound management practice and have been effective in achieving Metro's goals for the Library Board. Since 1982, the Library Board has not overspent its appropriation and has kept the Treasury Department up to date with respect to major significant changes in programme areas. Mr. Prasad defined such changes as brand new programmes which would have a long term financial impact of one hundred thousand dollars or more.

62. It is the Tribunal's conclusion that whereas the Library Board appears to be autonomous in the spending of its appropriation from Metro, the political reality is that the Library Board must live within that appropriation; it reports monthly on variation in the spending of its allocation; and must be prepared to justify any significant deviation. Metro exerts effective political control over the financial operations of the Library.

OPERATION OF THE LIBRARY

63. It was the position of the Respondents that the Library Board is an autonomous board that runs the day-to-day operations at the Library with no input from Metro. The Tribunal accepts that the day-to-day control of the Library rests with its Director, Frances Schwenger and with the Library Board.

64. Mr. Prasad testified that every five to seven years, the corporate consulting and policy group of Metro's Management Services Department goes in and reviews each department, agency, board and commission of Metro from a management perspective, to see if its mandate is still valid; asks whether the mandate should be updated; and determines whether the management practices are up-to-date. Mr. Prasad described this as a management review, that is, an overall comprehensive review that applies to everybody.

65. Management Services reviewed the operations of the Metro Library in 1985. Certain goals and objectives for the Library and a Mission Statement were formulated. We heard no evidence of this review from the witnesses called by the Library. Nonetheless, the Tribunal accepts that such a comprehensive review occurred, based on the evidence of Mr. Prasad, the 1989 Budget Documents of the Library Board, and the covering letter the Director of the Library, Frances Schwenger sent to Mr. Prasad with the 1989 budget. It is clear that Management Services assisted the Library in developing a three year plan, with objectives and timetables. The Library's ongoing review of and revisions to this plan are reported annually to Metro Council through the Metro budget process.

66. This planning document sets out a Task and Milestone List. The Library Board reports to Metro on the planned start and finish dates and the actual start and finish dates of each of the 36 objectives. These objectives include staff reorganization and training, revision of job descriptions, the extension of library hours, and the implementation of an effective inter-library loan system. The 1989 budget traced these objectives to determine if the timetable had been or would be achieved. The 1989 budget with this information was forwarded to the Management Services Department of Metro. Mr. Prasad testified that Management Services is probably still on top of these goals and objectives.

67. The Tribunal finds that Metro has reviewed or exercised supervision over the management of the Library. The Library Board may have been at liberty to ignore the report, but has chosen not to do so and has reported to Metro on the status of the implementation of the three year plan. Therefore, the Tribunal finds that Metro monitors the management of the Library Board and exerts, in effect, control over the long-term operations at the Library.

DECISION:

68. Applying the criteria to the facts of this case, the Tribunal finds that Metro has overall responsibility for the Library Board's budget; its budget is considered in the same manner as that of every other department, agency, board and commission of Metro. There is a detailed review by Metro of the programmes and services proposed by the Library Board. The extent of the review process is such that Metro cannot not be characterized simply as the paymaster or source of funds for the Library *Waterloo County Roman Catholic Separate School Board*, [1977] O.L.R.B. Rep. Dec. 8656 at p.857; *Province of Ontario Board of Internal Economy*, [1980] O.L.R.B. Rep. Jan. 88 at p.89. Instead, Metro exercises substantial control over the Library Board's budget. Metro bears the financial burden of the compensation practices at the Library. Either salary increases are

included in the annual request to Metro for funds, or the Library Board asks Metro Council to draw from Metro's contingency fund the negotiated wage adjustments. The pay equity adjustments for the Library have been budgeted as one percent of payroll and are a part of the normal 1990 budget process which Metro will fund. Although the day-to-day financial administration of the budget is done by the Library staff, the Library Board is subject to Metro's financial reporting guidelines. Moreover, the Library staff reports monthly to the Library Board on variances between expected and actual expenditures. Copies of the variance reports are sent to the Metro budget analyst who uses these reports to keep on top of the Library's financial situation. Finally, the Library Board administers their budget in the political context of Metropolitan Toronto; they must justify to Metro any changes to the programmes and services as part of the next year's budget. If the Library Board operates at a deficit it must seek additional funds from Metro Council. Metro benefits from any surplus at the Library. Therefore, Metro has the overall financial responsibility for the Library.

69. Who has responsibility for compensation practices? The Library Board has chosen to follow Metro's lead in negotiating the wage portion of the collective agreements. Therefore, the compensation practices for library workers are determined by the pattern set by Metro. It is the Library that attaches the value to a job based on its skill, effort, responsibility and working conditions, but changes in classification, and therefore in pay, are subject to review and approval by Metro. The labour relations reality is that whereas the Library Board is free to negotiate the wages and benefits with the Union, it has always chosen to follow the Metro settlements. In reality, it is Metro who most heavily influences, and therefore has the responsibility for, the compensation practices at the Library.

70. What is the nature of the business, the service, or the enterprise? On a day-to-day basis, the Library employees look to the Library Board as their employer. Public library services are a core activity of a municipality *Municipal Act* R.S.O. 1980 c.302 as amended s.208 46(a)(ii) and the *Public Libraries Act, 1984*. The *Municipality of Metropolitan Act* requires Metro to fund the Library Board as one of the services Metro must provide. The Library is integral to Metro and is not severable or dispensible from the municipality. The decision as to what library programmes and services are to be undertaken belongs initially with the Library Board, but final approval rests with the Metro politicians as part of the budget process. Moreover the budget process determines how much money will be allocated to these programmes and services. In conclusion, the Library provides an integral service for Metro which is not severable or dispensible from the Metro Corporation.

71. On the basis of the first three criteria, the Tribunal concludes that for pay equity purposes, Metro is the employer of the Library workers. It is the Tribunal's decision that the Library workers are part of the establishment of the Municipality of Metropolitan Toronto and that Metro is the employer of the Library workers for the purposes of the *Pay Equity Act, 1987*.

ORDER:

72. The Tribunal revokes the Order of the Review Officer dated June 8, 1989 in this matter.

73. The Tribunal hereby directs the employer, the Municipality of Metropolitan Toronto, and the bargaining agent, the Canadian Union of Public Employees, Local 1582, to negotiate in good faith and endeavour to agree, before the mandatory posting date, on a pay equity plan for the bargaining unit.

0004-89 0005-89 0006-89 Wentworth County Board of Education Applicant v. Wentworth Women Teachers' Association and Ontario Public School Teachers' Federation, Wentworth District Respondents; Ontario Secondary School Teachers' Federation, District 36 and the Ontario Secondary School Teachers' Federation Intervenors; Wentworth County Women Teachers' Association and Ontario Public School Teachers' Federation, Wentworth District Applicants v. Wentworth County Board of Education Respondent; Perth County Women Teachers' Association and Ontario Public School Teachers' Federation, Perth District Applicants v. Perth County Board of Education Respondent

Before: Beth Symes, Chair and Members Donald Dudar and Susan Genge

Appearances: Elizabeth Lennon and Karen Schucher for the Wentworth County Women Teachers' Association, the Ontario Public School Teachers' Federation, Wentworth District, the Perth County Women Teachers' Association and the Ontario Public School Teachers' Federation, Perth District; David Brady and Janice Baker for the Wentworth County Board of Education and for the Perth County Board of Education; Sherry Liang and Maurice Green for the Ontario Secondary SchoolTeachers' Federation, District 36 and the Ontario Secondary School Teachers' Federation

Application of Act - Party
Practice and Procedure - Intervention

Two school boards ("the Boards") applied for a hearing before the Tribunal with respect to an order of a Review Officer which found that there were seven job classes for elementary teachers. Several groups of elementary teachers ("the Federations") opposed this application. Two groups of secondary school teachers ("O.S.S.T.F.") applied to intervene in the proceedings on the basis that they would be substantially and directly affected by the decision because it would also determine job class for secondary school teachers.

The Tribunal permitted limited intervention by O.S.S.T.F..

The narrow test requiring a direct legal interest in order to participate in a case is no longer used by the courts or administrative tribunals. Increased participation may assist to promote a more fair, accessible and efficient system for the administration of justice. It may also assist the Tribunal to come to a more balanced and informed understanding of the facts and issues in dispute and thereby enable it to make better decisions. O.S.S.T.F. cannot participate as a party in these proceedings. Although s.32(1) of the *Act* lists the parties defined by statute, it does not define the upper limit. A person may also be a party pursuant to section 5 of the *Statutory Powers Procedure Act*, R.S.O. 1980, c. 484 (" the S.P.P.A."), where the principles of natural justice oblige the Tribunal to add them. These persons must have a substantial and direct interest in the outcome of the case. The Tribunal has the discretionary authority to permit interventions in a proceeding pursuant to s.29(2)(b) of the *Act*. In this case, the Tribunal used the following criteria to determine participation: (1) the nature and scope of the intervenor's concern; (2) whether the intervenor will assist the Tribunal in reaching a decision; (3) whether other mechanisms exist for dealing with the intervenor's concern; and (4) whether the parties will be prejudiced if the intervenor is permitted to participate.

In this case, O.S.S.T.F. possesses unique information and expertise concerning the historical development of the grid system of compensation for teachers, which is an issue in dispute. Because of the nature of the evidence and the normally adversarial relationship between OSSTF and the Board, the Tribunal prefers to hear that evidence through OSSTF's participation. The limited intervention would not unreasonably add to the length or the cost of the proceedings.

Tribunal Member Susan Genge dissented:

It is not clear that s. 5 of the *S.P.P.A.* would allow the Tribunal to add parties. In addition, section 32 of the *Act* should be construed so that parties to proceedings are limited to those listed. Therefore, O.S.S.T.F. is not entitled to be a party to these proceedings. In addition, O.S.S.T.F. should not be permitted to participate as a non-party intervenor. The tests developed by the majority should be applied in light of the specific issues in this particular case and in light of the purpose and structure of the *Act*. O.S.S.T.F. does not meet any of the four tests.

Tribunal Member Donald Dudar concurred in part:

O.S.S.T.F. should be permitted limited participation as a non-party intervenor. The question of the scope of the Tribunal's authority to add parties should be left to another day.

Pay Equity Process – Pay Equity Plan

Several groups of elementary teachers ("the Federations") applied for a hearing before the Tribunal with respect to an order of a Review Officer which found that two separate pay equity plans were required for elementary school teachers: one for the male teachers represented by the Ontario Public School Teachers' Federation ("O.P.S.T.F."), the other for the female teachers represented by the Federation of Women Teachers' Associations of Ontario ("F.W.T.A.O."). Two school boards ("the Boards") opposed this application. The Federations argued that only one plan was required for the bargaining unit consisting of all male and female elementary teachers.

The Tribunal held that one pay equity plan was required.

It is not helpful to determine the bargaining unit by first determining the bargaining agent. In unionized workplaces, both the responsibility for pay equity and the scope of any pay equity plan are determined by the related questions of bargaining agent and bargaining unit. It is necessary to determine both.

There must be a match between the pay equity plan and the collective agreement for a bargaining unit. The Tribunal does not accept that the bargaining unit for pay equity should be determined by membership in the trade union or organization. In determining the bargaining unit for elementary teachers, the Tribunal has considered the collective bargaining history between the parties, the relevant collective bargaining statutes, and the current collective agreements. Because of the combinations and permutations in teacher collective bargaining permitted by the *School Boards and Teachers Collective Negotiations Act*, the only way to determine the bargaining unit is to look at the negotiated collective agreement. On the basis of the collective bargaining history and the current collective agreement, the bargaining unit in this case consists of all male and female elementary teachers at each Board.

The Tribunal also finds that the joint branch affiliates of F.W.T.A.O. and O.P.S.T.F. hold exclusive bargaining rights for all elementary teachers, and therefore, the branch affiliates acting jointly constitute the bargaining agent for the purposes of the *Act*. Should the historical co-operation between the affiliates come apart for pay equity, an application may be made to the Tribunal on the basis that there has been a change of circumstances in the establishment.

In this case, it makes sense for the same organization and structure that negotiated the terms and conditions of employment to review those compensation practices to ensure compliance with the *Act*. It may well be that the female job classes are fairly compensated with respect to their value when compared to the male job classes. While the issue of value is not before the Tribunal, the *Act* does require the male and female job classes to be identified, valued and compared. The division of pay equity plans along gender lines will not permit this to happen, and would thus defeat the purposes of the *Act* which provides for a review of the existing compensation practices to redress systemic gender discrimination.

Tribunal Member Donald Dudar dissented:

In this case, there are two bargaining agents, and also two bargaining units for which pay equity plans must be developed. Bargaining agent is defined in the *Act*, which definition reinforces the fundamental characteristic of bargaining agency as enshrined in virtually all labour relations legislation: exclusivity. It is a contradiction in terms for more than one trade union or more than one bargaining agent to be certified as "exclusive" bargaining agent for a bargaining unit. Based on the jurisprudence involving teachers in other contexts, it is also clear that the term bargainig unit refers to the unit of all statutory members of a branch affiliate. The fact that affiliates may bargain together and enter into a single collective agreement, does not mean that they share a single bargaining unit. They remain separate, though they act as a single party executing a single collective agreement.

Comparisons – Job Class

Two school boards ("the Boards") applied for a hearing before the Tribunal with respect to an order of a Review Officer which found that there were seven job classes for elementary teachers. The Boards argued that all elementary classroom teachers constitute one job class on the basis that they all occupy one position. Several groups of elementary teachers ("the Federations") opposed this application. The Federations argued that there were seven distinct job classes, corresponding to the seven job categories on the compensation grid.

The Tribunal held that there were seven job classes for elementary teachers.

It is not helpful to approach the question of how many job classes there are by determinig how many positions there are. The *Act* does not define position, but it does define job class. In order to constitue a job class, positions in an establishment must meet all four criteria. Whatever definition of position is ultimately adopted, positions can never be larger than a job class by definition.

In this case, the issues in dispute amongst the parties are whether teachers require similar qualifications and/or whther they have the same compensation schedule, salary grade or range of salary rates. With respect to the first issue, the Tribunal finds that teachers in different categories require different qualifications, and that the differences in qualifications are sufficient to justify differences in compensation. While all teachers require an Ontario Teaching Certificate, it is not sufficiently specific to determine the job class. Therefore, elementary teachers are divided into seven job classes based on qualifications.

With respect to the second issue, the words "compensation shcedule, salary grade or range of salary rates" were meant to provide alternative methods for examining the compensation factor in the job class definition. If any of the three is different, then the last component of the definition of job class is not met. In this case, the ranges of salary arates and the number of steps to maximum differ from category to category. This grid is not continuous. Therefore, elementary teachers do not have the same range of salay rates and are therefore in seven different job classes.

Tribunal Member Donald Dudar dissented:

The word "position" in the definition of "job class" must be afforded some meaning. The basic thrust of the *Act* is to evaluate the functions that are performed, and to compensate them where appropriate. This process accords with the

way the workplace is organized, that is, by position. As well, this approach accords with the legislative regime governing teachers, and with the past conduct of the parties. On this basis, all teachers occupy one position, and therefore there is only one job class.

In the alternative, if there are in fact various positions for tteachers, they constitute one job class. All teachers possess similar qualifications. The seven categories are sufficiently similar to constitute one job class. All require an Ontario Teaching Certificate. The mere fact that one has passed additional voluntary courses in order to move to a higher category is not a sufficient basis on which to designate a different job class. Moreover, it is inappropriate to talk about qualifications as distinctive if those qualifications do not relate to different work.

All teachers are paid on the same "compensation schedule, salary grade, or range of salary rates". If two positions are on the same compensation schedule, *or* the same salary grade, *or* the same range of rates, then the positions can be grouped together in one job class. The parties have treated the grid as a single schedule, not a compilation of seven schedules. Movement from one grade to another usually requires the fiat of management; compensation is to bear some resemblance to the value of the work. That is not this case.

Champ d'application de la Loi – Partie
Pratique et procédure – Intervention

Deux conseils scolaires (les «conseils») ont demandé de se faire entendre devant le Tribunal en ce qui concerne un ordre d'un agent de révision portant que les enseignants du palier élémentaire appartenaient à sept catégories d'emplois distinctes. Plusieurs groupements d'enseignants de ce palier (les «fédérations») se sont opposés à cette requête. Deux groupes d'enseignants du palier secondaire (la «FEÉSO») ont déposé une requête en intervention dans l'instance en faisant valoir que la décision les toucherait considérablement et directement étant donné qu'elle aurait également pour conséquence de définir des catégories d'emplois s'appliquant aux enseignants du palier secondaire.

Le Tribunal a permis à la FEÉSO d'intervenir de façon limitée.

Les tribunaux judiciaires ou administratifs n'utilisent plus le test restrictif de l'intérêt direct reconnu en common law afin de permettre à une partie de participer à une cause. Un nombre plus élevé de participants peut favoriser la création d'un système d'administration de la justice plus juste, plus accessible et plus efficace. Une telle mesure peut également aider le Tribunal à avoir une idée plus informée et plus judicieuse des faits et des points en litige et à rendre, en conséquence, de meilleures décisions.

La FEÉSO ne peut pas participer à l'instance en qualité de partie. Même si le paragraphe 32 (1) de la Loi énumère les parties précisées par la loi, il ne fixe pas de limite maximale. Une personne peut également avoir qualité de partie conformément à l'article 5 de la Loi sur l'exercice des compétences légales, qui constitue le chapitre 484 des L.R.O. de 1980, si les principes de justice naturelle obligent le Tribunal à la joindre. Ces personnes doivent avoir un intérêt considérable et direct dans l'issue de la cause.

Le Tribunal dispose du pouvoir discrétionnaire de permettre des interventions dans une instance conformément à l'alinéa 29 (2) b) de la Loi. Dans la présente cause, le Tribunal s'est servi des critères suivants pour établir le bien-fondé de l'intervention : 1) la nature et l'ampleur de la préoccupation de l'intervenant; 2) l'aide éventuelle que l'intervenant peut apporter au Tribunal en ce qui concerne la prise d'une décision; 3) l'existence éventuelle d'autres mécanismes pour traiter de la préoccupation de l'intervenant; 4) la question de savoir si la participation de l'intervenant portera atteinte aux parties.

Dans la présente cause, la FEÉSO possède des renseignements et une expérience uniques en ce qui concerne l'historique de l'élaboration d'une grille de rémunération des enseignants, laquelle constitue une question en litige. En raison du caractère des preuves et des rapports normalement opposés qui existent entre la FEÉSO et le conseil, le Tribunal préfère entendre ces preuves de la FEÉSO même. Ce mode d'intervention limitée n'allongerait pas indûment l'instance ni n'en augmenterait considérablement les dépens.

Dissentiment de Susan Genge, membre du Tribunal

Il n'est pas évident que l'article 5 de la Loi sur l'exercice des compétences légales permet au Tribunal de joindre des parties. En outre, l'article 32 de la Loi devrait être interprété de façon que les parties aux instances ne soient que celles qui sont énumérées. Par conséquent, la FEÉSO n'a pas le droit d'être jointe en qualité de partie à l'instance.

De plus, la FEÉSO ne devrait pas avoir le droit d'agir en qualité d'intervenant ne possédant pas le statut de partie. Les tests élaborés par la majorité des membres du Tribunal devraient être appliqués en fonction des questions précises de la présente cause et compte tenu du but et de la structure de la Loi. La FEÉSO ne satisfait aucun de ces quatre tests.

Assentiment partiel de Donald Dudar, membre du Tribunal

La FEÉSO devrait avoir le droit d'être jointe de façon limitée, en qualité d'intervenant ne possédant pas le statut de partie. La question de l'envergure du pouvoir du Tribunal de joindre des parties devrait être étudiée un autre jour.

Processus d'équité salariale – Programme d'équité salariale

Plusieurs groupements d'enseignants du palier élémentaire (les «fédérations») ont demandé de se faire entendre devant le Tribunal en ce qui concerne un ordre d'un agent de révision portant que deux programmes d'équité salariale distincts sont nécessaires à l'égard des enseignants du palier élémentaire : un pour les membres masculins du personnel enseignant représentés par la Fédération des enseignants des écoles publiques de l'Ontario (la «Fédération des enseignants») et un autre pour les enseignantes représentées par la «Federation of Women Teachers' Association of Ontario (l'«Association des enseignantes»). Deux conseils scolaires (les «conseils») se sont opposés à cette requête. Les fédérations maintenaient qu'un seul programme d'équité salariale était nécessaire à l'égard de l'unité de négociation regroupant tous les enseignants et enseignantes du palier élémentaire.

Le Tribunal a décidé qu'un programme d'équité salariale était nécessaire.

On n'a pas besoin, pour définir l'unité de négociation, de définir d'abord l'agent négociateur. Dans les milieux de travail syndiqués, la responsabilité de l'équité salariale et l'ampleur de tout programme d'équité salariale sont fixés en fonction des questions connexes que constituent la définition de l'agent négociateur et de l'unité de négociation. Il est donc nécessaire de définir les deux.

Des ressemblances et des liens doivent exister entre le programme d'équité salariale et la convention collective d'une unité de négociation. Le Tribunal n'accepte pas que l'unité de négociation aux fins de l'équité salariale soit déterminée en fonction de l'adhésion au syndicat ou à l'organisation. Lorsqu'il a défini l'unité de négociation regroupant le personnel enseignant du palier élémentaire, le Tribunal a étudié l'historique des négociations collectives entre les parties, les lois pertinentes dans le domaine des négociations collectives et les conventions collectives en vigueur. En raison des combinaisons et des permutations dans le domaine des conventions collectives du personnel enseignant qu'autorise la Loi sur la négociation collective entre conseils scolaires et enseignants, la seule façon de définir l'unité de négociation est d'examiner la convention collective qui a fait l'objet d'une négociation. Compte tenu de l'historique des négociations collectives et de la convention collective en vigueur, l'unité de négociation dans la présente cause regroupe tous les membres masculins et féminins du personnel enseignant du palier élémentaire de chaque conseil.

Le Tribunal conclut également que les sections locales conjointes de l'Association des enseignantes et de la Fédération des enseignants jouissent de droits exclusifs de négociation en ce qui concerne tout le personnel enseignant du palier élémentaire et que, par conséquent, les sections locales agissant conjointement constituent l'agent négociateur aux fins de la Loi. Advenant l'échec de la collaboration historique entre les sections locales en ce qui concerne l'équité salariale, une requête peut être présentée au Tribunal pour le motif que la situation de l'établissement a changé.

Dans la présente cause, il est normal que la même organisation et structure qui a négocié les conditions d'emploi étudie les pratiques en matière de rémunération afin d'assurer le respect de la Loi. Il se peut fort bien que les catégories d'emplois à prédominance féminine soient bien rémunérées, du point de vue de leur valeur, par rapport aux catégories d'emplois à prédominance masculine. Bien que le Tribunal ne soit pas à proprement parler saisi de la question de la valeur du travail, la Loi précise qu'il faut que les catégories d'emplois à prédominance féminine et masculine soient définies et comparées et que la valeur du travail effectué dans chaque catégorie soit déterminée. La division des programmes d'équité salariale en fonction des sexes empêchera ces activités et irait donc à l'encontre des buts de la Loi qui prévoit un examen des pratiques actuelles en matière de rétribution afin d'éliminer la discrimination systémique entre les sexes.

Dissentiment de Donald Dudar, membre du Tribunal

Dans la présente cause, des programmes d'équité salariale doivent être élaborés pour deux agents négociateurs, et aussi deux unités de négociation. La Loi définit le terme «agent négociateur». Cette définition renforce la caractéristique fondamentale de l'organisme négociateur enchâssé dans pratiquement toutes les lois du domaine des relations de travail, à savoir l'exclusivité. Plusieurs syndicats ou plusieurs agents négociateurs ne peuvent pas être accrédités comme agent négociateur «exclusif» d'une unité de négociation. Compte tenu de la jurisprudence concernant le personnel enseignant dans d'autres contextes, il est également évident que le terme «unité de négociation» renvoie à l'unité qui regroupe tous les membres d'une section locale prévus par la loi. Le fait pour les sections locales d'engager des négociations ensemble et de conclure une seule convention collective ne signifie pas qu'elles représentent une seule unité de négociation. Elles restent indépendantes même si elles agissent en tant qu'une seule partie lorsque vient le temps de signer la convention collective unique.

Comparaisons – Catégories d'emplois

Deux conseils scolaires (les «conseils») ont demandé de se faire entendre devant le Tribunal en ce qui concerne un ordre d'un agent de révision portant que les enseignants du palier élémentaire appartenaient à sept catégories d'emplois distinctes. Les conseils maintenaient que tous les enseignants du palier élémentaire appartenaient à une catégorie d'emplois pour le motif qu'ils occupaient tous un poste. Plusieurs groupements d'enseignants du palier élémentaire (les «fédérations») se sont opposés à cette requête en faisant valoir qu'il existait sept catégories d'emplois distinctes correspondant aux sept catégories figurant sur la grille de rétribution.

Le Tribunal a décidé que les enseignants du palier élémentaire appartenaient à sept catégories d'emplois distinctes.

On n'a pas besoin, pour étudier la question du nombre de catégories d'emplois, de fixer le nombre de postes. La Loi ne définit pas le terme «poste», mais elle définit la «catégorie d'emplois». Afin de constituer une catégorie d'emplois, les postes d'un établissement doivent répondre aux quatre critères. Quelle que soit la définition finale du terme «poste», le poste ne peut jamais, par définition, comprendre plus de personnes que la catégorie d'emplois.

Dans la présente cause, les questions en litige entre les parties sont les suivantes : les enseignants doivent-ils posséder des qualités semblables et sont-ils visés par les mêmes grilles de rétribution, les mêmes niveaux de salaire ou les mêmes gammes de taux de salaire? En ce qui concerne la première question, le Tribunal conclut que les enseignants appartenant à différentes catégories ont besoin de qualités différentes et que celles-ci suffisent à justifier des rétributions différentes. Même si tous les enseignants ont besoin d'un brevet d'enseignement de l'Ontario, cette condition n'est pas suffisamment spécifique pour définir la catégorie d'emplois. Par conséquent, les enseignants du palier élémentaire se répartissent entre sept catégories d'emploi fondées sur les qualités.

Quant à la deuxième question en litige, chacun des termes «grille de rétribution, niveau de salaire ou gamme de taux de salaire» a été prévu afin de constituer un mode d'examen différent du facteur de la rétribution dans la définition des catégories d'emplois. Si un de ces trois éléments est différent, la dernière condition de la définition du terme «catérogie d'emplois» n'est pas remplie. Dans la présente cause, les gammes de taux de salaire et le nombre d'échelons entre le niveau minimal et le niveau maximal diffèrent d'une catégorie à l'autre. Cette grille n'est pas continue. Par conséquent, les gammes de taux de salaire qui s'appliquent aux enseignants du palier élémentaire ne sont pas les mêmes et les enseignants appartiennent à sept catégories d'emplois différentes.

Dissentiment de Donald Dudar, membre du Tribunal

Il faut définir, dans une certaine mesure, le terme «poste» dans la définition du terme «catégorie d'emplois». L'objectif fondamental de la Loi est d'évaluer les fonctions exécutées et de les rétribuer s'il y a lieu. Ce processus correspond au mode d'organisation du milieu du travail, fondé sur l'existence de postes. De plus, cette approche est compatible avec le système législatif qui régit les enseignants et avec les antécédents des parties. Compte tenu de ce qui précède, tous les enseignants occupent un poste et appartiennent, par conséquent, à une seule catégorie d'emplois.

Subsidiairement, s'il existe en fait plusieurs postes pour les enseignants, ces postes constituent une catégorie d'emplois. Tous les enseignants possèdent des qualités semblables. Les sept catégories sont suffisamment

semblables pour constituer une catégorie d'emplois. Tous les enseignants doivent détenir un brevet d'enseignement de l'Ontario. Le simple fait qu'un enseignant ou une enseignante ait volontairement pris des cours supplémentaires pour passer à un échelon supérieur ne justifie pas la création d'une catégorie d'emplois distincte. En outre, il n'est pas approprié de parler de qualités distinctes si ces qualités ne se rapportent pas à un travail différent.

Tous les enseignants sont rémunérés en fonction de la même «grille de rétribution», du même «niveau de salaire» ou de la même «gamme de taux de salaire». Si deux postes sont visés par la même grille de rétribution ou le même niveau de salaire ou la même gamme de taux de salaire, ils peuvent être regroupés dans une seule catégorie d'emplois. Les parties ont considéré la grille comme un seul barème et non comme un ensemble de barèmes. Le passage d'un niveau à un autre doit habituellement être sanctionné par la direction. La rétribution doit être liée d'une façon quelconque à la valeur du travail effectué, ce qui n'est pas le cas ici.

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Fire Departments Act, R.S.O. 1980, c.164, s.5.

Human Rights Code, S.O. 1981, c.53, s.38.

Labour Relations Act, R.S.O. 1980, c.228, ss.1, 5, 6, 7, 41, 43.

Pay Equity Act, 1987, S.O. 1987, c.34, ss.1, 2, 4, 6, 7, 9, 13, 14, 22, 25, 29, 32.

Police Act, R.S.O. 1980, c.381, s.29.

Public Commercial Vehicles Act, R.S.O. 1980, c.407, s.10.

School Boards and Teachers Collective Negotiations Act, R.S.O. 1980, c.464, ss.4, 5, 54.

Statutory Powers Procedure Act, R.S.O. 1980, c.484, s.5.

Teaching Profession Act, R.S.O. 1980, c.495.

Rules Referred To

Pay Equity Hearings Tribunal, *Rules of Practice*, Rule 16.

DECISION OF B. SYMES, CHAIR, JANUARY 22, 1990:

THE ISSUES:

1. Wentworth County Board of Education (the "Wentworth Board" or the "Board") requested a hearing before the Tribunal with respect to an Order of a Review Officer dated June 2, 1989 which found that there were seven job classes for elementary classroom teachers. It was the Board's position that this aspect of the Order was wrongly decided and that there is only one job class for elementary classroom teachers.

2. Wentworth Women Teachers' Association and the Ontario Public School Teachers' Federation, Wentworth District (the "Federations")requested a hearing with respect to the same Order which also ordered that separate pay equity plans be prepared for the male and female elementary teachers. It was the Federations' position that this aspect of the Order was wrongly decided and that only one pay equity plan is required for the bargaining unit which consists of male and female elementary teachers.

3. Perth County Women Teachers' Association and the Ontario Public School Teachers' Federation, Perth District (the "Federations") requested a hearing with respect to an Order of a Review Officer dated June 16, 1989 which required separate pay equity plans for the Women Teachers' and the Ontario Public School Teachers' Federations. The Perth Federations took the same position as did the Wentworth Federations, namely, only one pay equity plan is required for elementary teachers.

4. These matters were listed together by the Tribunal and heard together.

5. The Ontario Secondary School Teachers' Federation, District 36 and the Ontario Secondary School Teachers' Federation (OSSTF) sought leave of the Tribunal to participate fully in these proceedings with respect to the issue of the definition of job class. The Wentworth Board agreed to their participation. The Federations objected.

INTERVENTION:

OSSTF'S POSITION:

6. OSSTF represents all secondary school teachers in the province of Ontario, and, in particular, represents the secondary teachers at the Wentworth Board. It was their position that OSSTF will be substantially and directly affected by this decision which, they say, will define job class for classroom teachers. Counsel for OSSTF contended that all classroom teachers are engaged in the same job, that is, teaching, and all have the same duties and responsibilities. Individual teachers are paid on a salary grid which recognizes an individual's qualifications and experience. The system used to evaluate the qualifications of elementary teachers, Qualifications Evaluation Council of Ontario (QECO), grew out of the Certification System developed and used by OSSTF. OSSTF maintained that the definition of job class for one set of employees, elementary teachers,

will have an impact on another set of employees, secondary teachers, of the same employer. Counsel stated that the job classes proposed by the Federations, if adopted by the Tribunal, would affect OSSTF in its ongoing pay equity negotiations with the Wentworth Board as well as its negotiations with other boards of education throughout the province.

7. It was OSSTF's position that it was not necessary to have a direct legal interest in the matter in order to be permitted to participate in these proceedings. Counsel stated that the Tribunal has a discretion to permit their participation, and should base that discretion on the following criteria:

1. How remote or direct is the interest of the party seeking to intervene?
2. How useful would it be for the Tribunal to have this party participate?
3. Is there prejudice to the other parties to have such participation?

The Tribunal should balance these criteria based on the Tribunal's goal of a fair, accessible and efficient hearing procedure.

8. Counsel for OSSTF submitted that there is a trend toward permitting intervention in disputes between parties. That trend was reflected in the changes made to the Ontario Rules of Practice for Courts in 1984 (Rule 13) and in decisions of the courts and other tribunals. Intervention has been permitted when a decision would have a profound effect on the intervenor *Re Regional Municipality of Hamilton-Wentworth and Hamilton-Wentworth Save the Valley Committee, Inc. et al.* (1985), 51 O.R.(2d) 23 (Div. Ct.) at p. 44; when the case involves a question which actually or potentially affects many people or organizations *Re Ontario Energy Board* (1985), 51 O.R. (2d) 333 (Div. Ct.) at p. 338; and in *Gryd Construction Inc.*, [1975] O.L.R.B. Rep. Mar 230 at p. 233; in the first case where an issue will be determined which will have potential serious consequences *Batten and Newfoundland Association of Public Employees v. Bay St. George Community College* (1986), 59 Nfld. & P.E.I. R. 59 (Nfld. S.C.,T.D.) at p. 61; and finally, where the intervenor has a special interest, knowledge or concern that will be useful to the Court *R. v. Kopyto* (12 February 1987), (Ont. C.A.) [unreported].

9. Counsel submitted that OSSTF ought to be permitted to participate in these proceedings as this is the first case which will define job class for classroom teachers. The effect of this decision is unknown, but is potentially significant for OSSTF. OSSTF has an important body of knowledge about the certification of teachers which would be of assistance to the Tribunal. Although the participation of OSSTF will lengthen the hearing as it plans to call two witnesses, this will cause little prejudice to the parties. It was their position that when the Tribunal balanced fairness and accessibility in these proceedings, OSSTF should be permitted to participate.

WENTWORTH BOARD OF EDUCATION'S POSITION:

10. Counsel for the Wentworth Board submitted that the *Pay Equity Act, 1987* is quasi-constitutional legislation and that in interpreting the statute, the Tribunal should use a purposive approach. The Tribunal should assume that it has implicit powers unless there are statutory restrictions.

11. Counsel for the Board agreed that the law of intervention is expanding and that a party no longer needs a direct interest to participate in the proceedings. Increased participation is permitted to promote an efficient system of administration of justice, to protect absent persons' interests, to ensure a better informed Tribunal, and to legitimize a Tribunal's decision, Muldoon, Paul R., *Law of Intervention: Status and Practice* (Aurora, Ont.: Canada Law Book, 1989) at p. 14. The Tribunal should permit participation if the intervenor has a vital, legitimate or substantial interest.

12. It was Counsel's submission that this case involved complicated facts, was not local in nature, and was one of broad principle. It was the Board's position that the Tribunal should have all the information available to allow a reasoned decision. As OSSTF developed the first grid structure for paying teachers, it possesses unique information to help the Tribunal make its decision. Not having the OSSTF's participation will reduce the base of information for the Tribunal, and may cause extra work for the Tribunal in future cases.

13. It was the Board's position that the decision will define job class for all classroom teachers. Counsel said that it was unrealistic for a public body, such as this Board of Education, to agree to different job classes with its three teacher unions. Therefore, the decision in this case will substantially affect the pay equity bargaining between the Board and OSSTF. The Wentworth Board does not represent OSSTF nor OSSTF's interest in explaining the classification system. Moreover, the participation of OSSTF can be done in an orderly way without unnecessary cost and delay. For all these reasons, Counsel for the Board submitted that the OSSTF should be permitted to participate in these proceedings.

THE FEDERATIONS' POSITION:

14. Counsel for the Federations stated that there were two forms of participation in a hearing: as a party or as an intervenor. It was their position that OSSTF should not be permitted to participate in either capacity.

15. Counsel submitted that there were two types of party: first, those entities listed in the statute governing the proceedings; secondly, those entities entitled by common law or administrative law to participate. It was their position that section 32(1) of the *Pay Equity Act, 1987*, lists the parties specified by statute. This section is a minimum list of parties, not a maximum. To determine the question of parties, the Tribunal must go on to consider that although an entity is not listed in the statute, that entity may be entitled by law to be a party to the proceeding pursuant to section 5 of the *Statutory Powers Procedure Act*, R.S.O. 1980, c.484 and *Re Federation of Women Teachers' Association of Ontario and Ontario Human Rights Commission et al.* (1988), 67 O.R. (2d) 493 (Div. Ct.) at p.512. It was Counsel's submission that the reasoning of the Court in *MacCosham Van Lines (Canada) Co. Ltd. v. Minister of Transportation & Communications et al.* (1988), 66 O.R. (2d) 198 (Div. Ct.) was based on the excluding language of the *Public Commercial Vehicles Act*, R.S.O. 1980, as amended, c.407, or, in the alternative, that the case was wrongly decided and should not be followed.

16. Counsel submitted that those entities entitled by law to participate under section 5 of the *Statutory Powers Procedure Act* are those entities entitled to be present by natural justice, or by a duty of fairness. They may be described as those persons whose legal rights would be substantially and directly affected by the decision. These are the same kind of persons who would be entitled to third party notice in arbitrations.

17. Counsel submitted that parties participate as of right in a proceeding, are entitled to participate fully, and are bound by the decision.

18. The Federations took the position that OSSTF was not a party to these proceedings as they are neither listed in section 32(1) of the *Act* nor are they substantially and directly affected by the decision.

19. Counsel further submitted that the other form of participation is as a friend of the Tribunal. It was her position that participation as an intervenor remains limited in non–constitutional legal cases and in proceedings before administrative tribunals *Ontario Legal Aid Plan* (29 August 1989), (O.L.R.B.) [unreported] at para. 3; *Guadagni v. Workers' Compensation Board of British Columbia* (1988), 34 Admin L.R. 1 (B.C.C.A.).

20. It was Counsel's position that participation as a friend of the Tribunal was a matter in the discretion of the Tribunal. She argued that the Tribunal should exercise its discretion only where the issues in a case are of broad general application and where the proposed intervenor is qualified to offer some unique and helpful perspective to the Tribunal on the issues in the case. The admission of an intervenor should be done on strict terms. The participation should be limited to what is necessary to enable the Tribunal to understand the issues. Counsel submitted that intervenors should not participate in the calling of evidence unless they demonstrate that they are able to offer specific evidence which is not available to the parties. The intervenor should not be permitted to expand the issues. Counsel submitted that the Tribunal should exercise its discretion balancing the Tribunal's goal of expeditious hearings and the statutory deadlines for compliance. As a pay equity plan is negotiated between the bargaining agent and the employer and is deemed approved, there is very little that is of broad significance to permit intervention.

21. The Federations' position was that the issue in this case, the appropriate job class for elementary classroom teachers, does not affect secondary school teachers, nor does it affect OSSTF's right to negotiate and agree upon a different definition of job class with the Wentworth Board. This decision will bind neither OSSTF nor the Wentworth Board with respect to the pay equity plan for the secondary school teachers. Counsel submitted that OSSTF was simply concerned about the precedental value of the decision, which is not a basis upon which to justify participation.

22. Finally, counsel submitted that the salary grid for secondary teachers is so different from the grid for elementary teachers, that evidence concerning the development of the secondary grid

would not be helpful in determining job class for elementary teachers. If job class for secondary teachers were to become an issue in this case, it will expand the need for evidence and argument and thereby lengthen the case. Finally, the Wentworth Board could call OSSTF witnesses as part of its case.

DECISION:

23. After the first day of hearing, the Tribunal issued an oral ruling. It was the unanimous decision of the Tribunal that OSSTF was neither a party under section 32(1) of the *Act*, nor under section 5 of the *Statutory Powers Procedure Act*. In a majority decision, the Tribunal permitted OSSTF to participate in these proceedings as an intervenor solely on the issue of what is the appropriate job class for elementary teachers. OSSTF participation was limited to calling evidence with respect to the historical development of the payment of teachers, based on a grid of qualifications and experience. OSSTF was not permitted to cross-examine witnesses on any other issue. OSSTF was permitted to make submissions on the impact of this historical development on the issue of the appropriate job class for elementary teachers. Ms. Genge would not have permitted OSSTF to have participated in these proceedings. The Tribunal promised to provide written reasons for its decision.

24. The Tribunal has the fundamental power to control its own procedure to ensure that justice is done. The narrow test requiring a direct legal interest in order to participate in a case is no longer used by the courts nor by administrative tribunals (*Fishing Vessel Owners' Association of British Columbia v. Canada* (1985), 57 N.R. 376 (Fed. C.A.) at p. 381). The Tribunal agrees with counsel for the Wentworth Board that increased participation may assist to promote a more fair, accessible and efficient system for the administration of justice. Moreover, an added participant may assist the Tribunal to come to a more balanced and informed understanding of the facts and issues in dispute and thereby enable it to make better decisions.

25. It is the Tribunal's decision that persons may participate in a hearing either as a **party** as of right or as an **intervenor** at the discretion of the Tribunal.

PARTICIPATION AS A PARTY:

26. Who are the Parties to a proceeding under the *Pay Equity Act, 1987*? All counsel agreed that although section 32(1) of the *Act* listed the parties defined by statute, it did not define the upper limit as to who may be a party to a proceeding. All counsel submitted that to determine the issue the Tribunal must also consider section 5 of the *Statutory Powers Procedure Act*. I adopt these submissions. The *Pay Equity Act, 1987* specifies those parties who must be allowed to participate in a proceeding. If there are other persons, not specified by the *Act*, who are nevertheless entitled by law to be parties, then they must be allowed to participate as well. The Tribunal is persuaded that the principles of natural justice oblige the Tribunal to add persons who are entitled by law to be part of the proceeding (*Fishing Vessel Owners' Association of British Columbia v. Canada*; *Re Federation of Women Teachers Association of Ontario*). The Tribunal is not persuaded to

follow *MacCosham Van Lines (Canada)*; the Court in that case was interpreting a statute which said "only the applicant and the Minister are parties to the hearing ....." *Public Commercial Vehicles Act* s.10b(5). Section 32(1) of the *Pay Equity Act, 1987* does not include the same restrictive language and therefore does not oust the application of section 5 of the *Statutory Powers Procedure Act*. Moreover, the exclusion of such persons would be inconsistent with the principles of natural justice.

27. Those persons who are not expressly required by statute to be made parties, but who are nevertheless otherwise entitled by law to be parties in a proceeding must have a substantial and direct interest in the outcome of the case. These persons must be notified of the case and be permitted to participate in order to meet the requirements of natural justice. Such persons participate as of right in the proceedings; they may participate in all aspects of the case and are bound by the decision.

28. It is the Tribunal's decision that OSSTF is not a party to these proceedings. The determination of job class for elementary classroom teachers is the issue in this case. OSSTF is not bound by this decision and may negotiate for and agree upon a different definition of job class for secondary teachers. Therefore, OSSTF does not have a direct and substantial interest in the outcome of this case.

PARTICIPATION AS A NON-PARTY INTERVENOR:

29. Should OSSTF be permitted to participate as a non-party intervenor? The Tribunal has the authority to permit interventions in a proceeding pursuant to Section 29(2)(b) of the *Act* and may exercise that authority pursuant to Rule 16.01. Whether the Tribunal permits non-party intervenors to participate in the proceedings is an exercise of the Tribunal's discretion.

30. The Tribunal has used the following criteria to determine participation in this case:

- (i) What is the nature and scope of the Intervenor's concern in these proceedings?
- (ii) Will the participation of the Intervenor assist the Tribunal in reaching its decision? Will the Intervenor bring to the proceeding an expertise concerning the policy, factual or legal issues in dispute which is different than that of the parties?
- (iii) Are there other mechanisms for dealing with the Intervenor's concerns such as the filing of independent complaints; the consolidation of hearings; appearing as a witness for one of the parties?
- (iv) What prejudice will there be to the parties if the Intervenor is permitted to participate:
  - (a) will the intervention widen the issues in dispute?
  - (b) will the intervention delay an expeditious determination of the dispute?
  - (c) will the intervention unreasonably add to the cost of the proceedings for the parties?

If the intervention is allowed, the nature and extent of the participation will be determined by the Tribunal.

31. OSSTF seeks to participate in these proceedings concerning the definition of job class for elementary classroom teachers. OSSTF may be affected by the decision, but their concern is no different than that of other teacher federations or of other boards of education throughout Ontario. All may be affected by this decision, because it is the first occasion the issue of job class has been dealt with by the Tribunal.

32. There is no dispute that the OSSTF first developed the grid system for paying teachers based on their qualifications and experience and that the system used for elementary teachers, QECO, grew out of the secondary school experience. The Tribunal believes that OSSTF possesses unique information and expertise concerning the historical development of the grid system, which is an issue in dispute. This expertise is different than that of the Federations and the Wentworth Board. Although the Wentworth Board might call witnesses from the OSSTF with respect to this evidence, because of the nature of the evidence and the normally adversarial relationship between OSSTF and the Board, the Tribunal prefers to hear that evidence through OSSTF's participation. Such participation will not widen the issues in dispute. Counsel for OSSTF advised the Tribunal that, if permitted to participate, she intended to call two witnesses and that this may lengthen the proceedings. We are not persuaded that the limited intervention would unreasonably add to the length or the cost of the proceedings for the parties.

33. On the basis of these criteria, the Tribunal exercised its discretion and permitted OSSTF to participate on the limited basis contained in the oral decision.

HOW MANY PAY EQUITY PLANS MUST BE PREPARED FOR ELEMENTARY TEACHERS?

34. The *Pay Equity Act, 1987* requires the employer and the bargaining agent for a bargaining unit to negotiate in good faith and endeavour to agree on a pay equity plan for the bargaining unit (s. 14(2)). It was the Federations' position that only one pay equity plan was required at each Board for the bargaining unit consisting of all male and female elementary teachers. The Wentworth and Perth Boards maintained that two pay equity plans must be prepared for elementary teachers, one for the male teachers who are represented by the Ontario Public School Teachers' Federation (OPSTF), the other for the female teachers, represented by the Federation of Women Teachers' Associations of Ontario (FWTAO).

35. The term "bargaining unit" is not defined in the *Pay Equity Act, 1987* nor in the *School Boards and Teachers Collective Negotiations Act*, R.S.O. 1980, c.464. However, where the term is used in the *Pay Equity Act,1987*, bargaining unit determines the scope of the pay equity plan where there is a bargaining agent. Therefore, "bargaining unit" must be given meaning for elementary teachers

36. The *Pay Equity Act, 1987* states:

> "bargaining agent" means a trade union as defined in the *Labour Relations Act* that has the status of exclusive bargaining agent under that Act in respect of any bargaining unit or units in an establishment and includes an organization representing employees to whom this Act applies where such organization has exclusive bargaining rights under any other Act in respect of such employees.

37. *The Pay Equity Act, 1987* sets up both the structure for pay equity bargaining and a series of rights and obligations for bargaining agents and employers. In unionized workplaces, both the responsibility for pay equity and the scope of any pay equity plan are determined by the related questions of bargaining agent and bargaining unit. Therefore, it is necessary to determine both the bargaining agent and the bargaining unit for elementary teachers at these Boards.

FACTS:

38. Teachers are persons who hold valid teaching certificates and who are employed by a Board under either a probationary or a permanent teaching contract to teach (*Education Act*, R.S.O. 1980, c.129 as amended ss.1(1)66, s.230, and s.233). The standard form teaching contract provides that the Board agrees to employ the person as a teacher and the teacher agrees to teach (R.R.O. 1980, Reg 277, Form 1). Individual teaching contracts and the teacher collective agreements must be read together in order to determine the rights and duties of a teacher (*School Boards and Teachers Collective Negotiations Act*, s.54).

39. The *Teaching Profession Act*, R.S.O. 1980, c.495, establishes the Ontario Teachers' Federation (the "OTF") as the professional organization for teachers in the province. All teachers are required to belong to the OTF as a condition of teaching in Ontario. The OTF is composed of five affiliated groups: the Ontario Secondary School Teachers' Federation (OSSTF), the Federation of Women Teachers' Associations of Ontario (FWTAO), the Ontario Public School Teachers' Federation (OPSTF), l'Association des enseignantes et des enseignants franco-ontariens (AEFO), and the Ontario English Catholic Teachers' Association (OECTA). Membership in each of the five affiliates is determined by a by-law of the OTF. All women teachers teaching in a public elementary school must be members of FWTAO; men teachers teaching in a public elementary public school must be members of OPSTF. The constitution and bylaws of OPSTF also permit female elementary public school teachers to be members of OPSTF (article IV). There has been a lengthy history of litigation in the courts and before the Ontario Human Rights Commission between FWTAO and OPSTF with respect to membership. Membership is not an issue for this Tribunal. FWTAO and OPSTF have a common position on pay equity and wish to bargain pay equity jointly with the Wentworth and the Perth Boards of Education.

40. A branch affiliate is the local organization composed of all the teachers employed by a board who are members of the same affiliate. Branch affiliates are under an obligation to represent their members employed by the Board during the negotiation process for a collective agreement (*School Boards and Teachers Collective Negotiations Act* s.5). That *Act* establishes the structure of collective bargaining for teachers. Two or more Boards may choose to bargain together; two or more branch affiliates may choose to bargain together. A Board is bound by the decision of the branch affiliates to bargain separately, or together (*OECTA and AEFO v. The Cochrane-Iroquois Falls Roman Catholic Separate School Board*, (23 July 1986) (Education Relations Commission) [unreported].

41. The Tribunal heard evidence of the collective bargaining at the Wentworth Board, at the Perth Board, and throughout the province of Ontario. Since elementary teachers have bargained collective agreements, the branch affiliates of FWTAO and OPSTF have bargained together, not only at the Wentworth and Perth Boards, but also throughout the province. There has never been an instance where the affiliates of FWTAO and OPSTF have bargained separately. The *School Boards and Teachers Collective Negotiations Act*, which was enacted in 1975, merely codified the existing bargaining practices for elementary teachers throughout the province.

42. The branch affiliates of FWTAO and OPSTF appoint equal numbers of members to an Economic Policy Committee that negotiates the collective agreement on behalf of all elementary teachers. The conduct of the negotiations is monitored by all elementary teachers, not by the memberships of each of the branch affiliates separately. Barbara Young, an executive staff member in the collective bargaining department of FWTAO testified that the bargaining proposals developed by the Economic Policy Committee are approved by all elementary teachers. When a tentative collective agreement is to be ratified, all elementary teachers are polled together; their ballots are not distinguished by affiliate. The Education Relations Commission conducts strike votes of all the elementary teachers. The resulting agreement is executed by the Board and both branch affiliates as one collective agreement for all elementary teachers.

43. The formulation of bargaining demands, the negotiation process, and the resulting collective agreement, require the continued co-operation of both branch affiliates. Should that co-operation break down, either branch affiliate may withdraw from joint bargaining for the next round of negotiations (*School Boards and Teachers Collective Negotiations Act*, s.4(5)). That situation has never occurred between the FWTAO and the OPSTF branch affiliates in the history of negotiating elementary collective agreements, neither at the Wentworth Board, nor at the Perth Board, nor in the province of Ontario.

44. There is one collective agreement for all elementary teachers with the Wentworth Board and one collective agreement for all elementary teachers with the Perth Board. The masthead of the Wentworth collective agreement, for example, on behalf of the Board, of the first part, and the elementary teachers, of the second part, is clearly a two-party agreement. As well, the scope clause of the Wentworth collective agreement, article 2.01, refers to "all teachers". The Perth collective agreement covers "all certified teachers", article 1.01; provides that "this agreement shall be an agreement" and refers to "each of the parties"; states that the collective agreement shall govern the parties and all teachers contained herein.

THE FEDERATIONS' POSITION:

45. It was the Federations' position that, for the purposes of pay equity, bargaining unit should be defined as all employees who are actually covered by a collective agreement. In Wentworth and in Perth, the bargaining unit pursuant to each collective agreement is all elementary teachers.

46. The Federations maintained that this definition of bargaining unit is consistent with the collective agreements with each Board, with the bargaining regime established under *School Boards and Teachers Collective Negotiations Act*, and with the historical patterns of collective bargaining for teachers. Counsel submitted that the Tribunal should not unwind the lengthy bargaining history on the purely hypothetical basis that the branch affiliates may one day decide to go their separate ways in collective bargaining.

47. Counsel submitted that the Tribunal should reject the Boards' submission that the *School Boards and Teachers Collective Negotiations Act* is the bedrock authority which determines the bargaining units for teachers across the province. It was her position that the statutory bargaining relationships provided by the *School Boards and Teachers Collective Negotiations Act* are akin to a certificate under the *Labour Relations Act*, R.S.O. 1980, c.228. Counsel stated that, under that *Act*, parties may negotiate changes to the scope of the collective agreement. It is possible for the parties to bargain for geographical units that are either larger or smaller than in the original certificate; they may add persons who are not employees under the *Act*; they may subtract persons who are covered under the original certificate; they may merge full time and part time units. Once a collective agreement is negotiated, the wording in the collective agreement determines the scope of the bargaining unit and the force and effect of the labour relations certificate is spent. In support of this proposition, Counsel relied upon the following cases: *Gilbarco Canada Ltd.*, [1971] O.L.R.B. Rep. Mar. 155; *Re Miller et al. and Algoma Steelworkers Credit Union* (1974), 6 O.R. (2d) 676 (Div. Ct.); *Nelson Crushed Stone*, [1980] O.L.R.B. Rep. Oct. 1550; *Renfrew County and District Board of Health*, [1985] O.L.R.B. Rep. Feb. 323; *Re Sault Ste. Marie Board of Education and Canadian Union of Public Employees* (1974), 5 L.A.C.(2d) 178 (Shime); *Burns Meats Ltd.*, [1984] O.L.R.B. Rep. Aug. 1049.

48. It was the Federations' position that under *School Boards and Teachers Collective Negotiations Act*, when the branch affiliates choose to bargain together they act as one party. Once this decision has been taken, the remaining provisions of *School Boards and Teachers Collective Negotiations Act* contemplate that there will be two parties to the process of bargaining and to the collective agreement, namely, the Board, on one hand, and the affiliates acting together, on the other hand. The masthead of the Wentworth collective agreement on behalf of the Board, of the first part, and the elementary teachers, of the second part, is clearly a two-party agreement. Counsel for the Federations submitted that when the two affiliates choose to act together under *School Boards and Teachers Collective Negotiations Act*, they become a single party.

49. It was Counsel's position that the wording of the collective agreements, not the statutory provisions for negotiations, must also determine the bargaining unit for elementary teachers. The wording of both collective agreements ensures that the bargaining unit is all elementary teachers.

50. A single bargaining unit is also consistent with the bargaining practices for elementary teachers. Counsel submitted that the logical bargaining unit for pay equity purposes is the same unit as used for collective bargaining purposes, that is, all elementary teachers.

51. Counsel further submitted that there was no pay equity purpose to be served by fragmenting the bargaining unit into male and female teachers. The result of creating separate plans for the male teachers and for the female teachers, is a mirror image of each job class in each pay equity plan. This would be a perfect way to maintain the status quo and provide no possible adjustments for teachers. Moreover, it would create a totally artificial bargaining unit which exists nowhere in the real world. Counsel submitted that the purposes of the *Pay Equity Act, 1987* will be fulfilled if the existing bargaining unit of all elementary teachers is used.

THE BOARD'S POSITION:

52. The term "bargaining unit" is defined in the *Labour Relations Act* as a unit of employees appropriate for collective bargaining s.1(1)(b). Trade unions are certified as the exclusive bargaining agent for employees with a community of interest. The term "bargaining unit" is not used in the *School Boards and Teachers Collective Negotiations Act*. Counsel for the Boards submitted that the term is not necessary in that *Act* because membership is determined by law. As all teachers must be statutory members of their branch affiliates, there is no need of a certification process, and exclusive bargaining rights are given by statute to each branch affiliate.

53. Counsel submitted that the process for achieving pay equity depends upon whether there is a bargaining agent, not on the structure of the collective agreement. If the employees are represented, then the rights and duties under the *Act* fall to the bargaining agent. He said that each branch affiliate is a bargaining agent and has exclusive the right to represent its members.

54. Counsel for the Boards submitted that whether the Boards or the branch affiliates choose to bargain together, they do not lose their separate identities; the branch affiliates do not lose their rights or obligations to represent their members (s.5); and separateness of parties is maintained (s.11). The result of this process may be one or more collective agreements (s.4).

55. Counsel submitted that although the *Pay Equity Act, 1987* contemplates two or more employers coming together to negotiate a pay equity plan (s.2), there is no such provision to combine two or more bargaining agents of an employer into a single plan. Therefore, although branch affiliates may chose to bargain pay equity together, the end result must be a separate bargaining unit for each bargaining agent. It was his submission that the *Act* focuses on who is the bargaining agent and is silent with respect to the negotiating process (s.6(4), 13(9), 7(2), 9(2), 14, and 22).

56. It was the Boards' position that in bargaining for a collective agreement, each branch affiliate is free to pursue its own self interest, including refusing to continue joint negotiations. Counsel reviewed a lengthy history of litigation in the Courts and before the Ontario Human Rights Commission between FWTAO and OPSTF to demonstrate that there was a fundamental dispute over membership in their respective organizations. It was his position that the existence of this fundamental dispute and the separateness of the two organizations are antithetical to the branch affiliates negotiating and being bound by one pay equity plan.

57. The Boards concluded that there must be two pay equity plans for elementary teachers, one for the male teachers, the other for the female teachers. Counsel submitted that one pay equity plan for all elementary teachers would eliminate the logical male comparator for the female elementary classroom teachers, that is, the male elementary classroom teacher.

DECISION:

58. Counsel for the Boards submitted that in order to determine the pay equity plan we should look first to who is the bargaining agent as the determination of bargaining agent will also determine the pay equity plan. After considering that possibility, the Tribunal has decided that this approach is not helpful.

59. The *Pay Equity Act, 1987* acknowledges that the status of bargaining agent is determined under other statutes (s.1(1)). Status may be obtained in many ways. A trade union may be certified by the Ontario Labour Relations Board as the exclusive bargaining agent of employees in a unit that the Board deems appropriate for collective bargaining (*Labour Relations Act* s. 5, 6 and 7). The employer and the trade union may negotiate successive collective agreements whose terms substantially alter the scope of the original certificate. Once a collective agreement is negotiated, the wording in the collective agreement determines the scope of the bargaining unit and the force and effect of the labour relations certificate is spent. An employer may voluntarily recognize an organization as the exclusive bargaining agent of its employees and may enter into a collective agreement which sets out the unit of employees the agreement covers. Other statutes, such as the *Fire Departments Act*, R.S.O. 1980, c.164, s.5 or the *Police Act*, R.S.O. 1980, c.381, s.29 set out a scheme for collective bargaining and the role of the bargaining agent.

60. There is no necessary unity between bargaining agent and bargaining unit. It is common for one bargaining agent to be the exclusive bargaining agent for more than one bargaining unit in an establishment. For example, a bargaining agent may represent both the full time and the part time workers, each of which is a separate bargaining unit. The bargaining agent may also represent workers in the office as well as the plant. Traditionally, those employees are in separate bargaining units. The *Pay Equity Act, 1987* is clear that there must be a separate pay equity plan for each bargaining unit (s. 14(1)).

61. The determination of bargaining agent does not necessarily determine the scope of a pay equity plan. Therefore, bargaining unit is an issue which the Tribunal must analyse and determine, since bargaining unit is fundamental to the scope of a pay equity plan.

BARGAINING UNIT:

62. The *Act* specifies that a pay equity plan must be prepared for each bargaining unit in the establishment (s.14(1)) and that the adjustments to compensation required by a pay equity plan are deemed to be incorporated into and form part of the relevant collective agreements (s.13(10)). "Collective agreement" is defined in the *Pay Equity Act, 1987* as "an agreement in writing between

an employer and a bargaining agent covering terms and conditions of employment" (s.1(1)). There must be a match between the pay equity plan and the collective agreement for a bargaining unit. It would not be logical to merge the results of two pay equity plans into one collective agreement. Bargaining unit is not defined in the *Act*.

63. In determining what is the bargaining unit for elementary teachers, the Tribunal has considered the collective bargaining history between the parties, the relevant collective bargaining statutes, and the current collective agreements.

64. Counsel for the Boards submitted that bargaining unit for pay equity should be determined by membership in the trade union or organization. This approach is not helpful. On the one hand, there may be employees in a bargaining unit who are not members of the trade union (for example, the *Labour Relations Act*, s.43). On the other hand, there may be members of an organization who are not in the bargaining unit. For example, there may be members of a trade union or organization who are not employees. The constitutions of both FWTAO and OPSTF provide for membership in their organizations for persons who are not employees of any school board. Secondly, a person may be a member of FWTAO or OPSTF, and may be an employee of a school board, but may not be in the bargaining unit if the duties of such a person are other than teaching (*Ontario Teachers' Federation v. Metropolitan Separate School Board* (1976), 13 O.R. (2d.) 499 (C.A.) at p.501; and *Peterborough County Board of Education* (17 March 1988) (arbitration decision of K. Burkett) [unreported] at p.21). Finally, a female elementary teacher may be a member of FWTAO pursuant to a by-law of the OTF and a member of OPSTF by the latter's constitution. The evidence was that she may look to either FWTAO or OPSTF to represent her during the grievance process. In other words, a person may be a member of more than one organization. For all of these reasons, the Tribunal rejects the submission that membership in FWTAO or in OPSTF determines the bargaining unit.

65. The passage of the *School Boards and Teachers Collective Negotiations Act* in 1975 merely codified the collective bargaining history. That *Act* sets out a number of possible structures for negotiating collective agreements (s. 4). For example, two boards of education may decide to bargain together. When they choose to do so, the *Act* provides that the two boards act jointly as a party (s. 4(1)). Another possible structure is for the branch affiliates of FWTAO and OPSTF to decide to bargain together (s. 4(3)). That is a decision of the branch affiliates; the board of education can play no role in that decision. The *Act* also provides that the two branch affiliates may choose to act jointly as a party (s.4(1)). Once the two branch affiliates have agreed to bargain together, the remaining provisions of the *School Boards and Teachers Collective Negotiations Act* are consistent with a two party structure, the employer on one side, and the two affiliates acting jointly on the other.

66. Moreover, the Education Relations Commission has said in *OECTA and AEFO v. The Cochrane-Iroquois Falls Roman Catholic Separate School Board* at page 2, a case in which the branch affiliates of OECTA and AEFO no longer wished to bargain together:

> Since 1977 the School Board has negotiated with the Branch Affiliates through a *joint* negotiating committee. Each collective agreement over the period has been between the

> School Board and both Branch Affiliates rather than each individual Branch Affiliate. In short, there has been one set of negotiations and one collective agreement rather than two.

The Commission went on to state, at page 15:

> Section 11 requires the parties to "negotiate in good faith and make every reasonable effort to make and agreement or renew the agreement." We believe that Section 11 requires the School Board to negotiate with the negotiation team determined by each Branch Affiliate and that the School Board cannot attempt to dictate the structure of bargaining utilized by the Branch Affiliates. The pressing of such a demand to impass we find to be a violation of the Act.

The branch affiliates have the right to determine the nature and structure of collective bargaining. If they choose to bargain together, the school board is bound by that decision. One collective agreement results from this two-party process.

67. For as long as elementary teachers have negotiated collective agreements with boards of education, the branch affiliates of FWTAO and OPSTF have negotiated together on behalf of all elementary teachers. Collective agreements have always been ratified by elementary teachers voting in one unit. The result is a single collective agreement which covers all elementary teachers. This pattern of negotiations has been the same at the Wentworth Board, at the Perth Board, and throughout the province. Never have the branch affiliates of FWTAO and OPSTF bargained separately; never has joint bargaining resulted in more than one collective agreement.

68. The *School Boards and Teachers Collective Negotiations Act* neither defines nor determines the bargaining unit. Because of the combinations and permutations in teacher collective bargaining permitted by that *Act*, the only way to determine the bargaining unit is to look at the negotiated collective agreement. The results are similar to those under the *Labour Relations Act*. Once a collective agreement is negotiated, bargaining unit is determined by the words of the collective agreement, not by the labour relations certificate (*Labour Relations Act*, s.41; *Gilbarco Canada Ltd.*; *Re Miller and Algoma Steelworkers Credit Union*).

69. The collective agreements for elementary teachers at the Wentworth Board and at the Perth Board are similar to the collective agreements throughout the province. Each is a single document, signed by the respective board and the branch affiliates. The provisions of each agreement are clear; they cover all elementary teachers; the terms and conditions of employment for male and for female teachers are the same. The Tribunal determines that for both the Wentworth and the Perth Boards of Education there is one collective agreement that covers all elementary teachers at that Board.

70. The purpose of the *Pay Equity Act, 1987* is to redress systemic gender discrimination in compensation for work performed by employees in female job classes (s. 4(1)). "Compensation" is defined as "..... all payments and benefits paid or provided to or for the benefit of a person ....." (s. 1(1)). As the focus of the *Act* is compensation, it is logical to define bargaining unit as those employees subject to the compensation practices set out in a collective agreement. Using this

determination, the bargaining unit in this case consists of all male and female elementary teachers at each Board. Such a determination is consistent with the negotiation history, with the *School Boards and Teachers Collective Negotiations Act*, and with the collective agreements for elementary teachers.

BARGAINING AGENT:

71. A bargaining agent is responsible for negotiating and maintaining pay equity (s.14(2) and s.7(2)). It is necessary to determine which organization has these responsibilities under the *Pay Equity Act, 1987*. The concept of bargaining agent in the *Act* determines with whom the employer must bargain pay equity; the determination also provides security for the trade union or organization with respect to the pay equity representation of its members for pay equity purposes.

72. The negotiations for teacher collective agreements are not governed by the *Labour Relations Act*. To define "bargaining agent" for teachers, we must examine the second part of the definition which provides that a bargaining agent includes "an organization representing employees to whom this *Act* applies where such an organization has exclusive bargaining rights under any other Act, in respect of such employees" (s.1(1)). Bargaining rights for teachers are determined under the provisions of the *School Boards and Teachers Collective Negotiations Act*. This latter *Act* may be of assistance in determining which organization is the bargaining agent for the employees at the Wentworth Board and at the Perth Board.

73. Bargaining for collective agreements for teachers may take many forms. One such form is for the branch affiliates of FWTAO and OPSTF to decide to negotiate together for a collective agreement which covers all elementary teachers. Once that decision is made, the branch affiliates of FWTAO and OPSTF become one party (*School Boards and Teachers Collective Negotiations Act* s.4(3)). That party has the exclusive bargaining rights for all elementary teachers during these negotiations. This joint structure is preserved until the next round of collective bargaining (s.4(5)). Joint negotiations for the branch affiliates of FWTAO and OPSTF have always taken place at the Wentworth Board, at the Perth Board, and throughout the province.

74. The Tribunal finds that at the Wentworth and Perth Boards, the joint branch affiliates of FWTAO and OPSTF hold exclusive bargaining rights for all elementary teachers and therefore, for the purposes of the *Pay Equity Act, 1987*, the branch affiliates acting jointly constitute the bargaining agent. Each Board of Education will bargain pay equity with the joint branch affiliates.

75. Should the historical co-operation between FWTAO and OPSTF come apart for pay equity, an application may be made to the Tribunal on the basis that there has been a change of circumstances in the establishment (s.25(2)).

76. There is no reason why the structure for negotiating pay equity for elementary teachers should be any different than the structure for negotiating a collective agreement. The branch affiliates at FWTAO and OPSTF wish to negotiate pay equity jointly. There is nothing in the *Pay Equity Act, 1987* which would prohibit this structure for joint bargaining. Similarly, there is nothing

in this *Act* which would require a party to a collective agreement to divide into two for pay equity negotiations. In *Haldimand-Norfolk (Regional Municipality of)* (30 June 1989), 0001-89 (P.E.H.T.) [now reported as *Haldimand-Norfolk (No.3)* (1989) 1 P.E.R. 17] the Tribunal stated at p. 57:

> The law does not seek to disrupt collective bargaining relationships nor to reshape the description of existing bargaining units. Just as bargaining agents and employers are bound by other remedial legislation such as the *Pension Benefits Act, 1987* and are required to negotiate to conform with new standards of public policy, so too they must meet the requirements of the *Pay Equity Act, 1987*. Those requirements elicit the assistance of existing collective bargaining structures, they do not seek to dismantle them. It is the adjustments to rates of compensation that become part of existing collective agreements, it is not required that the plans do. In this way the statutory framework of the *Act* provides for the minimum disruption to existing collective agreements while still making provision for the achievement of the legislation's purpose, the redress of systemic gender discrimination between female and male job classes in an establishment of the employer.

In this case, it makes sense for the same organization and structure that negotiated the terms and conditions of employment for elementary teachers to review those compensation practices to ensure compliance with the *Pay Equity Act, 1987*.

77. Secondly, a separate pay equity plan for male and for female elementary teachers would defeat the objectives of the *Pay Equity Act, 1987* by artificially removing the male teachers from the bargaining unit. The net effect of such a separation would be to create a female pay equity plan with job classes which perfectly mirror those job classes in the male pay equity plan and therefore, would wrongly eliminate any possible pay adjustments for teachers.

78. Thirdly, it may well be that the female job classes are fairly compensated with respect to their value when compared to the male job classes. The issue of value is not before the Tribunal. But the *Pay Equity Act, 1987* does require the male and female job classes to be identified, valued and compared. The division of pay equity plans along gender lines will not permit this to happen. The Tribunal finds that such a dual structure of male and female pay equity plans will defeat the purposes of the *Act*, which provides for a review of the existing compensation practices to redress systemic gender discrimination.

79. Finally, male and female elementary teachers in the Catholic school system are members of a single branch affiliate, OECTA. There is one collective agreement covering all elementary teachers with their board. It is clear that one pay equity plan is required for all male and female elementary teachers in the Catholic school system. Therefore, the female job classes in that bargaining unit will be able to compare to male job classes through the establishment. There may not be any pay adjustments. But the parties will fulfil the purpose and intent of the *Act*, namely to value and compare the female job classes. To create two pay equity plans, one for male elementary teachers and one for female elementary teachers in the public school system illustrates how artificial such a structure would be.

80. In conclusion, the Tribunal determines that the Wentworth Board and the Perth Board must each negotiate with the joint branch affiliates, one pay equity plan for the bargaining unit consisting of all male and female elementary teachers employed by the respective Boards.

HOW MANY JOB CLASSES ARE THERE FOR ELEMENTARY CLASSROOM TEACHERS?

81 . "Job class" is defined in s.1(1) of the *Act* as:

> those positions in an establishment that have similar duties and responsibilities and require similar qualifications, are filled by similar recruiting procedures and have the same compensation schedule, salary grade or range of salary rates.

82. The identification of job classes is a fundamental yet preliminary decision in the process of preparing a pay equity plan. The term job class is used throughout the *Pay Equity Act, 1987*. Section 4 for example, not only sets out the purpose of the *Act*, but also explains that systemic gender discrimination in compensation is to be identified by undertaking comparisons between each female **job class** in an establishment and the male **job classes** in the establishment. As a component part of the negotiated pay equity plan (s.13) the identification of job class must be agreed to by the parties. It is through the use of the concept of job class that discrimination under this *Act* is to be identified and redressed.

83. The identification of job classes is also a preliminary step. The determination of job classes is one of the first steps to be accomplished in pay equity bargaining under the *Act*. (*Cybermedix Health Services* (6 July 1989) 0003-89 (P.E.H.T.) [now reported as *Cybermedix Health Services Ltd*. (1989) 1 P.E.R. 41]).

84. The issue in this case is: how many job classes exist for elementary classroom teachers? The position of the Board is that all elementary classroom teachers are in one job class. The Federations' position is that there are seven job classes, namely, the seven categories for elementary teachers: D, C, B, A1, A2, A3, and A4. Although the parties made extensive submissions on valuing the work of these categories, neither the system for evaluating the work of teachers, nor the value of teachers' work are issues in this case.

FACTS:

85. Persons employed as elementary teachers, whether they teach junior kindergarten or grade 9, must hold an Ontario Teacher's Certificate (*Education Act*, R.S.O. 1980, c.129 asamended, s.233). The qualifications necessary to obtain such a certificate have changed significantly over time and are set out in regulations and schedules to this *Act*. Since 1974, to qualify as a teacher, one must complete a university degree and a year of teacher training. When the qualifications changed in 1974, those persons who held a valid teacher's certificate were grandparented, that is, they were allowed to continue teaching although they lacked the new and higher qualifications. The teaching profession and the boards of education strongly encouraged these persons to upgrade their educational qualifications. Today, there are six male and 118 female elementary teachers at the Wentworth Board who fall into this grandparented group.

86. Into the 1950's, the system of compensating teachers varied from board to board. In some cases, a teacher negotiated her individual salary with a member of the school board; in other cases teachers were paid on a merit system. There was no common agreement as to which qualifications should be recognized and compensated. The teacher federations sought a negotiated compensation process that was systematic. They were opposed to including merit as a basis of compensation because merit was seen as a subjective measure of teaching performance. Instead, the federations advocated an objective standard for measuring a teacher's performance, based on qualifications and teaching experience. This bargaining position was based, in part, on an educational philosophy which assumed that the more education and the more teaching experience a person had, the better teacher he or she would be, and, in part, on the anticipation that this negotiation stance would produce higher compensation for teachers. The teacher federations were successful in persuading school boards to pay teachers on the dual basis of qualifications and teaching experience.

87. In 1958, OSSTF developed a system to evaluate secondary school teachers' qualifications. The system, which divided secondary teachers into four categories based on educational qualifications, was quickly adopted by all school boards. The system, which has been modified several times, is administered by OSSTF and evaluates the qualifications of all secondary school teachers in the province. Compensation for secondary school teachers is based on this certification system.

88. In 1969, AEFO, OECTA, FWTAO and OPSTF jointly created the Qualifications Evaluation Council of Ontario (QECO) to develop a system to evaluate the teaching qualifications of their members. The QECO system was developed by persons who had had extensive experience with the OSSTF certification system and was an outgrowth of the OSSTF certification system. QECO divided teachers into seven categories: D, C, B, A1, A2, A3, and A4 based on their educational qualifications. QECO is complex. In general, however, teachers in Categories D, C, and B do not have university degrees; those in categories A1 through A4 do. Teachers are encouraged to move from one category to another, by acquiring additional approved university or Ministry of Education courses. QECOw too has been modified several times, and has been generally, but not universally, accepted by school boards as the measure of elementary teacher qualifications.

89. Elementary teachers are paid on a two-dimensional salary grid based on qualifications and years of teaching experience. One axis represents the seven QECO categories. A teacher moves across the salary grid when she or he acquires additional approved university or Ministry courses in the required order and combination, and thus moves from one qualification category to another. The other axis represents years of teaching experience. A teacher moves down the grid after completing each year of teaching to a set maximum. The 1987/88 salary grid was:

THE WENTWORTH COUNTY BOARD OF EDUCATION

SCHEDULE 'A' - ELEMENTARY SALARY GRID

EFFECTIVE SEPTEMBER 1, 1987 - AUGUST 31, 1988

Years' Exp. September 1, 1987	Level D	Level C	Level B	Level A1	Level A2	Level A3	Level A4
0	16,593	18,099	19,432	23,222	24,445	26,214	28,032
1	17,723	19,274	20,874	24,445	26,231	27,051	29,667
2	18,757	20,309	22,188	25,385	27,549	28,383	31,308
3	19,838	21,435	23,411	26,701	29,052	31,222	32,949
4	20,937	22,657	25,385	28,016	29,991	33,172	34,591
5	22,094	23,786	26,701	28,956	31,496	34,768	36,009
6	24,821	25,290	28,206	30,652	32,438	36,364	37,543
7		26,795	29,711	31,965	33,751	37,605	38,845
8		28,300	31,588	33,092	35,819	39,027	40,443
9		30,177	33,283	36,290	37,888	40,267	41,865
10			35,819	39,396	40,334	41,865	43,639
11					41,744	44,525	46,565
12 & over						46,726	50,637

The grid is not a rectangle; that is, there are fewer steps in the lower categories than in the higher categories. The Tribunal heard evidence from the Boards' and from the Federations' witnesses that the grid was negotiated in this fashion to encourage teachers to acquire additional educational courses so that they would move into a higher category with additional steps for experience.

90. At the Wentworth Board there are elementary classroom teachers in all seven categories, distributed by gender as follows:

	males	females
D	1	21
C	1	34
B	4	63
A1	7	18
A2	25	58
A3	37	73
A4	85	110

Statistics from the Education Relations Commission show a similar distribution by category of male and female elementary teachers in each school board throughout the province. These statistics also show that female elementary teachers working full-time earn 84% of male elementary teachers also working full-time. A portion of this gap may be explained by the fact that there are more men than women teachers in positions of added responsibility. Some portion of the gap is attributable to the distribution of men and women in the seven categories.

91. It was the position of the Wentworth Board and of OSSTF that the system of compensation treats male and female teachers the same. The fact that female elementary teachers earn less than male elementary teachers and are found in the lower categories out of proportion to their presence at the Board, is not as a result of discrimination. There may be many reasons for this distribution, including problems in employment equity. Counsel submitted that the grid, which has been agreed to by the Board and the Federations for many years, should be left untouched by pay equity.

92. Counsel for the Federations submitted that this system of compensation is discriminatory, namely it has had an adverse impact on female elementary teachers who earn less than men and are found, in disproportionate numbers, at the bottom of the grid. Counsel relied on the analysis of discrimination in *Action Travail des Femmes v. C.N.R.*, [1987] 1 S.C.R. 1114 at p.1139. It was their position that the *Pay Equity Act, 1987* was enacted to redress systemic discrimination in compensation (s.4(1)), and that job classes should be determined in accordance with the goals of the legislation.

93. The purpose of this *Act* is to redress systemic gender discrimination in compensation for work performed by employees in female job classes (s. 4(1)). The *Act* requires employers and bargaining agents to jointly review the present system for valuing work using the criteria in the *Act* and to agree upon the adjustments required by the statute in order to achieve pay equity (s. 7(1) and 14(2)). Therefore, both the Wentworth Board and the Federations must review the existing system for valuing teachers to ensure that it meets the requirements of the *Act*. Gender discrimination in compensation will not necessarily be addressed by treating male and female teachers the same. To achieve gender equality, the parties must consider the impact of the compensation practice on male and female elementary teachers. The Supreme Court of Canada stated that discrimination is to include the impact of policies and practices in the following decisions: *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 141 at p.164, 165; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at p.347.

94. The determination of job class must be consistent with the purpose of the *Pay Equity Act, 1987*. The parties must value the work of the male and the female job classes. In order to do that, the parties must negotiate and endeavour to agree on the gender-neutral comparison system to be used. The outcome of this process may be no adjustments for the female job classes. In other words, the present system of valuing the work of elementary teachers may meet the requirements of this *Act*. Nonetheless, the *Act*, requires the parties to review the present system.

95. The four criteria of job class are:

(i) similar duties and responsibilities

(ii) require similar qualifications

(iii) are filled by similar recruiting procedures and

(iv) have the same compensation schedule, salary grade or range of salary rates.

In order to constitute a job class, positions in an establishment must meet all four criteria. The Tribunal is led to this conclusion for the following reasons. First, the use of the conjunctive "and" in the definition indicates that the language of the definition was meant to be inclusive. Secondly, each of the four criteria listed above captures very different aspects of work. Taken together, it is clear that the Legislature intended that each of these four measures must be the same or similar for a group of positions in order for that group of positions to be treated as one job class under the *Act*. Thirdly, this conclusion is supported by section 1(6) of the *Act*. That section provides that if a position is unique because of its duties, responsibilities, qualifications, recruiting procedures *or* compensation schedule, salary grade or range of salary rates, then it may constitute a job class by itself. Thus, section 1(6) means that a difference in any one of these four measures justifies the placing of a position in a different job class, even if the result will be a job class consisting of only one position. Therefore, all four criteria must be used to determine job class.

96. The Board's first position was that all elementary classroom teachers occupy one position. Counsel submitted that vacant teaching positions are advertised for and filled by teachers. The compensation paid to the individual teacher depends upon his or her qualifications and teaching experience. Qualifications and teaching experience are characteristics of the individual teacher, not of the position. Counsel submitted that it was not necessary to consider the four criteria of job class as all teachers occupy one position.

97. The Tribunal did not find this analysis helpful. The *Act* does not define position, but it does define job class. Job class is fundamental to the *Act*, because it is the unit contemplated by the *Act* for comparing the value of male and female work. Therefore, the issue for the Tribunal is to determine the job classes for elementary classroom teachers.

98. The *Act* defines job class as consisting of one or more positions, where those positions are similar in the manner delineated by the legislation. Position according to this definition, is a subset of the larger concept of job class. It follows therefore, that a position must be the same size or smaller than a job class and must have similiar attributes. Put another way, whatever definition of position is ultimately adopted, it can never result in a position being larger than a job class nor in having different attributes. While a job class may include one or more positions, a position may not include more than one job class.

99. What allows positions to be grouped together in a job class is precisely the similarity that exists between them in respect of each of the four criteria. To propose a definition of position which

is broader in scope than the definition of job class is to suggest that considerations of similarity have a lesser role to play than the statute demands. The legislation clearly provides that to constitute a job class, positions must exhibit similarity within and between the four criteria listed in the definition.

100. If the Legislature had intended to end the analysis of job class at the word "position", the definition would be very different. For example, it might have said "a job class consists of similar positions". Instead, the definition of job class continues on to provide four separate criteria which must be considered in determining what constitutes a job class. In essence, the Board defined position using only the criterion of similar duties and responsibilities. In doing so, the Board read out of the definition of position the remaining three criteria, which is not right. It is the Tribunal's decision that positions must also meet all four criteria for job class as set out in section 1(1) of the *Act*. That is, if one or more of the criteria are different, the positions are in different job classes.

101. The decision of Mr. Dudar analyzes the workplace in terms of the functions performed. He defines position in an organization as the same work. That is, position is defined solely in terms of duties and responsibilities. His decision finds that distinctions in pay for elementary teachers are based on the attributes of the individuals who perform the work. The Tribunal disagrees with this analysis.

102. We agree that if the duties and responsibilities are different, then the base units of work, classroom teachers, are not in the same job class. We do not agree that the analysis of the base unit of work stops if the duties and responsibilities of classroom teachers are the same. Pay equity concerns compensation. If the base unit of work is compensated differently depending on qualifications, recruiting practices, or compensation schedule, salary grade or range of salary rates, then those base units of work must be in different job classes even if the duties and responsibilities are identical. Whether or not classroom teacher is the base unit of work, the Tribunal must still consider whether classroom teachers are compensated based on different qualifications, whether they are recruited by similiar procedures, and whether they have the same compensation schedule, salary grade, or range of salary rates. The analysis of the work performed does not stop at duties and responsibilities.

103. Therefore, the Tribunal must consider whether elementary classroom teachers meet the four criteria. There is agreement by the parties that all elementary classroom teachers have similar duties and responsibilities, namely, teaching. There is also agreement that elementary teaching positions are filled by similar recruiting procedures. Moreover, the evidence is that in recruiting, the Boards seek the best qualified teacher, that is, the teacher with the best educational qualifications and teaching experience. This is consistent with the philosophy of the education profession. The dispute amongst the parties is whether teachers require similar qualifications and/or have the same compensation schedule, salary grade or range of salary rates.

QUALIFICATIONS:

The Board's position:

104. It was the Board's position that all elementary classroom teachers must have the same qualification to teach, namely, an Ontario Teacher's Certificate. The Board said that all teachers are under an obligation to continually update their professional qualifications. Teachers are then paid on the basis of their individual qualifications. Counsel submitted that as pay equity was enacted to evaluate positions, not individuals, the Ontario Teacher's Certificate should be used as the qualifications requirement for classroom teachers.

The Federations' Position:

105 It was the Federations' position that, for the purposes of compensation, elementary classroom teachers are divided into seven categories based on their educational qualifications. Therefore, there are seven job classes for these teachers.

Decision:

106. The Tribunal's decision is that elementary classroom teachers are divided into seven job classes. All elementary classroom teachers do require as a **minimum** an Ontario Teacher's Certificate. This is the same **minimum** requirement for secondary school teachers, for principals, for vice-principals, and for consultants. Nonetheless, it is agreed that these latter teachers are not in the same job class as elementary classroom teachers. In other words, the requirement of an Ontario Teaching Certificate is merely a minimum, but is not sufficiently specific to determine the job classes for elementary classroom teachers.

107. The purpose of the *Pay Equity Act, 1987* is to redress systemic discrimination in compensation. Therefore, in defining job class, the Tribunal considered that in compensating teachers, teachers are divided by educational qualifications. Teachers in one category require different educational qualifications than those teachers in another category. The Federations and the Board have agreed that the differences in qualifications are sufficient to justify differences in compensation. A teacher can move from one category to another only if she or he acquires the QECO specified courses for that category. The parties have negotiated a collective agreement which adopts the seven QECO categories and which provides that if a teacher moves to a new category, she or he will receive additional compensation. Wendy Matthews, the president of the Wentworth Women Teachers' Association, testified that she jumped from Category B to Category A3 when she completed her university degree. The categories are distinct; progression through the categories is neither linear nor continuous.

108. The Tribunal accepts that all elementary teachers have a professional obligation to continue their growth and development throughout their teaching career. But teachers in Category A4 are under the same obligation as those teachers in Category D. However, there is no obligation on a teacher to move from one category to another. Teachers can and do spend their entire teaching career in Category D. Moreover, this obligation on teachers is no different than similiar obligations on employees in other professions and occupations.

109. We disgree with Mr. Dudar's decision which states that in determining job class, it is inappropriate to consider qualifications, if qualifications do not relate to different work. Again, this analysis of job class stops at duties and responsibilities, ignoring the other three criteria. Furthermore, these parties have negotiated a collective agreement which adopts the educational philosophy that the more education and the more experience a person has, the better teacher she or he will be. This philosophy is reflected in the agreement that qualifications and experience provide an objective standard of teaching performance. This philosophy is also reflected in the negotiated compensation practices which pay more for higher qualifications and more experience.

110. The seven negotiated categories require different qualifications. Therefore, elementary classroom teachers are divided into seven job classes based on qualifications.

COMPENSATION:

The Board's Position:

111. Counsel for the Board submitted that the salary grid for elementary teachers is a compensation schedule and that all elementary teachers have the same compensation schedule.

The Federations' Position:

112. It was the Federations' position that there are seven ranges of salary rates, one for each QECO category.

Decision:

113. The fourth criterion for job class is "... and have the same compensation schedule, salary grade or range of salary rates". The terms "salary grade or range of salary rates" were added after first reading of Bill 154 and incorporated into the *Pay Equity Act, 1987*. The words were clearly meant to provide alternate methods for examining the compensation factor in the job class definition. If the compensation schedule or the salary grade or the range of salary rates for positions are different, then the last component of the definition of job class is not met.

114. It is the Tribunal's decision that there are the following seven ranges of salary rates to compensate elementary teachers in the Wentworth Board:

Category D	$16,593 to $24,821 in 6 steps
Category C	$18,099 to $30,177 in 9 steps
Category B	$19,432 to $35,819 in 10 steps
Category A1	$23,222 to $39,396 in 10 steps
Category A2	$24,445 to $41,744 in 11 steps
Category A3	$26,214 to $46,726 in 12 steps
Category A4	$28,032 to $50,637 in 12 steps

Each category from D to A4 has its own range of salary rates. Each category has its own minimum and maximum rate and the number of steps to maximum is specific to each category. All D Category teachers are paid within one range of salary rates, as are all C Category teachers, and so on. The ranges of salary rates and the number of steps to maximum differ from category to category. The grid is not continuous. A teacher moves from one range of salary rates into another range only if she or he acquires the additional educational qualifications in order to change QECO categories. In addition, teachers can and do remain in the same range of salary rates for their entire teaching career.

115. The parties have negotiated a collective agreement which provides that a teacher will move from one range of salary rates to another range of salary rates when that teacher acquires the required additional educational qualifications. We disagree with the decision of Mr. Dudar that movement from one range to another "requires the fiat of management". In this case, the employer has chosen to bargain this issue. That bargain is set out in articles 9 and 10 and in Schedule "A" to the collective agreement. The bargain is, that a teacher moves to a different range of salary rates when that teacher changes categories.

116. For compensation purposes, elementary teachers do not have the same range of salary rates. Therefore, elementary classroom teachers are in seven different job classes.

JOB CLASS:

117. As both the qualifications and the ranges of salary rates differ from category to category, there cannot be one job class for elementary classroom teachers. As all four criteria are met within each of the seven categories into which elementary teachers are divided for compensation purposes, there are seven job classes for elementary classroom teachers.

ORDER:

118. The Tribunal confirms that part of the Order of the Review Officer dated June 2, 1989 which directed that there are seven job classes for elementary classroom teachers at the Wentworth County Board of Education.

119. The Tribunal revokes that part of the Order of the Review Officer dated June 2, 1989 which ordered the preparation of two pay equity plans, one for the male and one for the female elementary teachers at the Wentworth County Board of Education. The Tribunal declares that there must be one pay equity plan for elementary teachers at the Wentworth County Board of Education.

120. The Tribunal orders the Wentworth County Board of Education to negotiate with the Wentworth Women Teachers' Association and the Ontario Public School Teachers' Federation, Wentworth District, acting jointly. The Tribunal orders both parties to negotiate in good faith and endeavour to agree on one pay equity plan for all elementary teachers employed by the Board.

121. The Tribunal revokes the Order of the Review Officer dated June 16, 1989 with respect to the Perth County Board of Education. The Tribunal declares that there must be one pay equity plan for elementary teachers at the Perth County Board of Education.

122. The Tribunal orders the Perth County Board of Education to negotiate with the Perth County Women Teachers' Association and the Ontario Public School Teachers' Federation, Perth District, acting jointly. The Tribunal orders both parties to negotiate in good faith and endeavour to agree on one pay equity plan for all elementary teachers employed by the Board.

DECISION OF TRIBUNAL MEMBER S. GENGE, DATED JANUARY 22, 1990

1. I concur with the decision of the Chair on the issues of the number of pay equity plans required and the job classes for elementary teachers.

2. I dissent from the decision of the Chair on the question of the participation of the Ontario Secondary School Teachers' Federation in this hearing.

3. As indicated on September 18, 1989 when the oral ruling on this question was given, I agreed with the majority of the panel that OSSTF could not be added as a party to the proceedings. However, I came to this conclusion for different reasons. Section 32(1) of the *Pay Equity Act, 1987* clearly specifies who the parties to a proceeding before the Pay Equity Hearings Tribunal shall be. They are the employer, the objector or complainant and the bargaining agent, if the pay equity plan relates to a bargaining unit. This section of the *Act* is consistent with other provisions of the Act in that it names those persons or entities that have been identified throughout the *Act* as having rights and obligations under the *Act*, and are in the best position to carry out the statutory purpose of the *Act*. Section 32(1) should be construed so that parties to proceedings before the Tribunal are limited to those listed. Clearly, OSSTF does not fall into any of these categories.

4. It is not clear that section 5 of the *Statutory Powers Procedure Act* would allow the Tribunal to add parties. Section 5 provides:

> The parties to any proceedings shall be the persons specified as parties by or under the statute under which the proceedings arise or, if not so specified, persons entitled by law to be parties to the proceedings.

5. One meaning may be simply that anyone specified by the legislation cannot be denied status as a party and that only if the legislation does not specify, does the issue of "persons entitled by law" come into play.

6. I disagree with the analysis provided in the Chair's decision of *MacCosham Van Lines (Canada) Co. Ltd.* v. *Minister of Transportation and Communications et al.* (1988), 66 O.R (2d) 198 (Div.Ct.). I do not agree that the use of the phrase "the only parties" in the *Public Commercial Vehicles Act*, which was under consideration in that case, is as significant as the Chair suggests. It is notable that the *Statutory Powers Procedure Act* does not require such specific language as the "only" parties; rather, it directs us to look at "the persons specified as parties by or under the statute". Again, section 32(1) is specific about who may be parties in proceedings before the Pay Equity Hearings Tribunal.

7. In addition, I disagree that the decision of the Division Court in *Re Federation of Women Teachers' Associations of Ontario and Ontario Human Rights Commission et al.* (1988), 67 O.R. (2d), 492 (Div.Ct.) provides any assistance in determining an interpretation of section 5 of the *Statutory Powers Procedure Act*. In that case, the Court held that regardless of whether FWTAO was granted status to appeal under section 38(2)(d) of the *Human Rights Code* or under section 5 of the *Statutory Powers Procedure Act*, their rights of appeal were preserved. In other words, the Court did not directly analyze section 5 of the *Statutory Powers Procedure Act*, as it was unnecessary to do so in that case.

8. The Chair's decision draws a distinction between "party" and "non-party intervenor". It is not clear however what the difference between the two actually is. Nevertheless, if the Chair's decision is right and section 5 of the *Statutory Powers Procedure Act* or section 29(2)(b) of the *Pay Equity Act, 1987* allow added parties or added intervenors, I am of the opinion that OSSTF's application for status would still fail on the proposed tests for non-party intervenor.

9. The Chair addresses the issue of participation in terms of several specific questions. Before examining those questions it is useful to look at the issues in this particular case and at the purpose and structure of the *Pay Equity Act, 1987*. This case concerns the definition of job class for elementary teachers employed by the Wentworth School Board. It involves a dispute between the Teachers' Federations and the Wentworth School Board. That is, it is a dispute between two parties. It is not an issue of general public interest. The *Act* establishes a series of rights and obligations on employers, employees and unions; as in this case, disputes under this *Act* will primarily involve two parties who are attempting to fulfil their statutory responsibilities. As noted earlier, section 32(1) of the *Act* mirrors this reality. Within this framework, there is no room for an intervenor whose concerns are indirect.

WHAT IS THE NATURE AND SCOPE OF THE INTERVENOR'S CONCERN IN THESE PROCEEDINGS?

10. OSSTF's concern with the issue of job class is primarily a concern with precedent. They argued that the definition of job class in this case could have an impact on the definition of job class for secondary school teachers employed by the Wentworth Board. The possible precedential value of the decision of the Tribunal concerning the definition of job class under the *Act* may be of interest to many in the province. However, a concern with precedent is not sufficient to allow participation in a hearing.

11. Furthermore, the scheme of the *Pay Equity Act, 1987* is such that the OSSTF and the Wentworth Board of Education are free to negotiate their own definition of job class for the purposes of a pay equity plan for secondary school teachers in Wentworth. Section 14 of the *Act* provides the mechanism for the negotiation and execution of a pay equity plan between an employer and a bargaining agent. The decision in this case will not infringe upon OSSTF's rights in this regard.

WILL THE PARTICIPATION OF THE INTERVENOR ASSIST THE TRIBUNAL IN REACHING ITS DECISIONS? WILL THE INTERVENOR BRING TO THE PROCEEDING AN EXPERTISE CONCERNING THE POLICY, FACTUAL OR LEGAL ISSUES IN DISPUTE WHICH IS DIFFERENT THAN THAT OF THE PARTIES?

12. The status of friend of the Tribunal is not appropriate for OSSTF in this case. OSSTF did not put itself forward as an objective expert on the issue of elementary job classes. On the contrary, they indicated that they would be supporting the position of the Wentworth County Board of Education and that they wanted to participate to defend the perceived interests of their

membership. While they argued that they had some expertise with the original development of a grid system of payment for teachers, their expertise relates to the history of the grid system for the secondary panel. This case concerns elementary teachers. Insofar as historical developments might be relevant, it is elementary teacher grids with which the Tribunal must be concerned.

ARE THERE OTHER MECHANISMS FOR DEALING WITH THE INTERVENOR'S CONCERNS SUCH AS THE FILING OF INDEPENDENT COMPLAINTS; THE CONSOLIDATION OF HEARINGS; APPEARING AS A WITNESS FOR ONE OF THE PARTIES?

13. The appropriate mechanism for OSSTF to bring its concern with the definition of job class for the secondary school teachers which it represents is through an independent complaint to the Tribunal, failing agreement between OSSTF and the Wentworth Board of Education, or as a witness if either party wishes them to assist in clarifying or advancing their case.

WHAT PREJUDICE WILL THERE BE TO THE PARTIES IF THE INTERVENOR IS PERMITTED TO PARTICIPATE:

(I) WILL THE INTERVENTION WIDEN THE ISSUES IN DISPUTE?

(II) WILL THE INTERVENTION DELAY AN EXPEDITIOUS DETERMINATION OF THE DISPUTE?

(III) WILL THE INTERVENTION UNREASONABLY ADD TO THE COST OF THE PROCEEDINGS FOR THE PARTIES?

14. Allowing OSSTF to participate in these hearings would result in prejudice to the elementary Teachers' Federations in the following ways. OSSTF's participation would by definition, and even given the limitations proposed by the majority, widen the issues in dispute. This case concerns the question of the definition of job class for the elementary panel. The OSSTF can only deal with the secondary panel, with which we are not concerned.

15. The proceedings would be delayed to some extent because of additional witnesses, additional time for cross-examination and for summary submissions. Costs would go up accordingly.

16. However, the most serious prejudice would result from the fact that the Teachers' Federations would be subjected to a double defence of their position. Both OSSTF and the Wentworth Board of Education have taken the same position on the question of the definition of job class for elementary teachers. Teachers' Federations then would be put in the position of having to defend before two sets of counsel leading evidence and making submissions in support of the same proposition.

17. For these three reasons, the participation of OSSTF would prejudice the position of the elementary Teachers' Federations in this case.

18. In summary then, I would not have allowed the Ontario Secondary School Teachers' Federation to participate in this hearing as they meet neither the standards for party status nor the criteria proposed by the Chair for non-party intervenor status.

DECISION OF TRIBUNAL MEMBER D. DUDAR, DATED JANUARY 22, 1990, AS AMENDED BY DECISION OF TRIBUNAL MEMBER D. DUDAR, DATED JANUARY 24, 1990

INTERVENTION

1. The Tribunal issued the ruling concerning the request by OSSTF to participate in the hearing, as outlined in the majority decision. I do not agree with one aspect of the reasons of the Chair, and, further, I disagree with one objection raised by Ms. Genge in her dissenting decision on this matter.

2. As set out in the reasons of the Chair, there are two lines of argument on the question of the admission of an entity as a party to a hearing: pursuant to s.32(1) of the *Pay Equity Act, 1987*, S.O. 1987, c.34; or pursuant to s.5 of the *Statutory Powers Procedure Act*, R.S.O. 1980, c.484.

3. I accept the finding of the Chair that in this case, OSSTF is not a party to these proceedings no matter which of the above two provisions are relied upon. Given that the result is the same in any event, it was unnecessary in my view to make any final determination of the scope of those provisions. I prefer to leave the question of the scope of the Tribunal's authority to add parties to another day.

4. Nor, however, do I accept the "double defence" argument by Ms. Genge to reject the requested participation. It is implicit in any request for participation that the position for or against the opposing view will be buttressed. Were we to accept the "double defence" argument, we would essentially foreclose the possibility of any intervention, regardless how appropriate.

5. On balance, then, I agreed to allow OSSTF's participation on the limited basis outlined in the ruling.

THE ISSUES

6. The questions in this case are the number of pay equity plans required for the branch affiliates representing the elementary school teachers in the Wentworth and Perth Boards of Education, and the number of job classes for elementary classroom teachers.

7. The majority finds that there is one bargaining unit at each Board, comprising the members of both OPSTF and FWTAO. Further, they find that there are seven job classes for elementary classroom teachers.

8. At the outset of this section, I wish to deal with a general objection. The majority write (at para. 84) that "neither the system for evaluating the work of teachers, nor the value of teachers' work are issues in this case." Further, (at para. 93), they write "Gender discrimination in compensation will not necessarily be addressed by treating male and female teachers the same. To achieve gender equality, the parties must consider the impact of the compensation system on male and female elementary **teachers.**" (emphasis mine)

9. I do not agree. The *Act* mandates that the employer (jointly with the bargaining agent, where there is one) review the impact of compensation practices on **job classes.** Section 4 of the *Act* states

> 4.-(1) The purpose of this Act is to redress systemic gender discrimination in compensation for work performed by employees in female job classes.
> (2) Systemic gender discrimination in compensation shall be identified by undertaking comparisons between each female job class in an establishment and the male job classes in the establishment in terms of compensation and in terms of the value of the work performed.

10. The process prescribed by the *Pay Equity Act, 1987* is to subject existing compensation practices to a new test, that of gender neutrality. Where it is found that pay inequities based on gender exist, the *Act* requires adjustments to pay rates. The *Act*, however, does not require wholesale reorganization or redesign of the enterprise for the purpose of proving that inequities exist. It provides a mechanism for determining the extent of any such inequities. Only when the mechanism is applied to existing practices is the employer required to act; the employer is not required to contort itself into hypothetical or wished-for structures that might serve a goal of a greater adjustment.

11. I am concerned that the majority is requiring of the employer just such a re-construction. This concern is further fuelled by the majority's reference to *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 141 and *R v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 pointing for a need to be attentive to the outcome or result rather than the determination of a preliminary question such as position or job class. However much we might like to see the lowest paid teacher level compared with (anticipated) higher paid-lower or equally valued male job classes, we cannot require this if they are not properly a job class. Only once we know what is the job class can we determine whether it is a male or female job class (or neither). Only once we know whether female and male job classes exist is the employer required to evaluate and compare jobs. The desired comparisons do not determine which structures are job classes; the structures determine the comparisons.

JOB CLASSES

12. The definition of job class in the *Act* is

> those positions in an establishment that have similar duties and responsibilities, require similar qualifications, are filled by similar recruiting practices, and have the same compensation schedule, salary grade or range of salary rates

13. The majority finds that "positions in an establishment must also meet all four criteria". (para. 95) I find this approach problematic for two reasons. First, it is a recognized principle of interpretation that meaning must be given to the Legislature's words when considering any given provision. By failing to ascribe meaning to the word "positions", the majority has skirted its mandate. Secondly, by not defining "position", the majority is unacceptably vague about what it is that is to be compared.

14. I agree with the majority that positions cannot be broader in scope than a job class. I agree, as well, that positions, once defined, will exhibit the four characteristics for grouping positions in job classes. This does not lead me to conclude, however, that the four criteria determine position. Were this so, it seems that positions will always be equal in size to job class, which seems to be the extra-ordinary situation permitted by s.1(6). Therefore, I find reliance on the four criteria to determine position as incorrect.

15. The Board first proposed that all teachers hold one position. It did so on the basis that all teachers perform the same work. I find this argument convincing for several reasons.

16. First, the basic thrust of the *Act* is to ensure that work performed predominantly by women, of equal value to, though different from work performed predominantly by men, is to be paid equally (under other specified conditions). Thus, it is the functions that are performed which are to be evaluated, then compensated where appropriate. This process, when it is considered, makes eminent sense, for it accords with the way in which the workplace is organized, that is, by positions. The *Act* contemplates subjecting the current structure of the workplace (positions) to scrutiny along the lines of compensation. It does not require employers to reorganize their operations. To ensure that comparisons are not unnecessarily identified with individuals, the *Act* provides a further level of protection or isolation by aggregating positions into job classes.

17. Secondly, the approach which gives meaning to "positions" accords with the legislative regime governing teachers. The position of teacher is defined in the *Education Act*, R.S.O. 1980, c.129 as amended, the *School Board and Teachers Collective Negotiations Act*, R.S.O. 1980, c.464, the *Teaching Profession Act*, R.S.O. 1980, c.495 and in the regulations promulgated under these statutes. In each case, the position of teacher is defined indivisibly in relation to the duties performed. All teachers are statutorily required to accept the same duties and responsibilities. In defining "teacher", no distinction is drawn in the legislation between teachers occupying different QECO categories, nor among teachers who have obtained Additional Qualifications ("AQs") granted by the Ministry of Education. Similarly, the positions of Principal, Vice Principal, Coordinator, and Consultant are also statutorily defined. These positions of added responsibility ("PARs") are distinguished from that of "teacher", on the basis of added responsibilities which inhere in these positions. I note that Principals, Vice Principals, Coordinators, Consultants and Assistants to the Unit Principal are all paid a premium for their additional responsibility.

18. Thirdly, the parties have conducted themselves in a manner which strongly suggests that they accept that elementary teachers constitute one position. For instance, the Federations accept that PARs each constitute separate and distinct job classes. Principals are paid at a rate determined by their QECO level (in this case, there are Principals in levels B, A3 and A4) plus a premium for their additional responsibility. Other PARs are similarly found at the various QECO levels. The parties did not offer an explanation for this. It would seem however, that the parties have agreed to these job classes on the basis that they consist of different positions, in turn distinguished on the basis of different work performed and not QECO levels. Given this agreement, it seems inconsistent now to request that the question of job class for teachers not be determined in the same fashion, that is on the basis of position.

19. The parties have also treated teacher as a position during collective bargaining. The collective agreement treats teachers in exactly the same fashion, regardless of their QECO classification. Hiring, advancement, benefits, seniority, and redundancy are all independent of QECO classification, while pay reflects QECO level and experience.

20. In the alternative, if one accepts that there are various positions for teachers, I find in any event, that the teachers constitute one job class. As there was no dispute as to the similarity of the duties and responsibilities, nor the similarity of recruitment procedures, I will confine my remarks to the questions of compensation and qualification.

Qualifications:

21. The majority has found that the seven QECO levels are sufficiently dissimilar from one another in terms of qualifications that each should correspond to a separate job class. I disagree with this conclusion for several reasons.

22. First, the evidence in this case indicates that requirement for teaching is an Ontario Teacher's Certificate ("OTC"). Individuals are hired solely on the basis of having obtained an OTC, and thereafter, within four months of beginning work, their compensation may be adjusted in order to accord with their QECO classification.

23. The majority finds, however, that the fact that teachers are required to have an OTC is not sufficiently distinctive to identify the position of teacher. They rely on the fact that all PARs are required to hold the OTC. I do not find this argument persuasive because the PARs also require qualifications in addition to the OTC which clearly distinguish the PARs from "teachers".

24. I am supported in this view by the following additional consideration. Certain specialist teachers are required to hold AQs in order to perform in special assignments such as Special Education, English as a Second Language, Music, and Guidance. The QECO levels parallel the AQ regime, but are not exactly correlative. Yet the Federations agree that there are no separate job classes for these specialty teachers, while proposing distinctions along the line of QECO levels which do not distinguish based on the work performed.

25. Secondly, I note that the different QECO levels are distinguished solely on the basis of the number of Ministry approved or university courses that one has obtained over and above the OTC. Each level builds on the last. A teacher beginning in level D, by taking an appropriate selection of courses, can move from that level through to level A4. Progression through the grid is therefore continuous and cumulative. I am not prepared to hold that the mere number of additional voluntary courses passed is a sufficient basis upon which to designate a different job class. The example of Ms. Matthews, cited by the majority to illustrate that the QECO levels are not continuous, is not helpful. The example illustrates, simply, Ms. Matthews' particular selection of courses, and nothing about the grid itself. The example does nothing to show that the levels are not a series of points along a continuum.

26. Thirdly, and more fundamentally, I think that it is inappropriate to talk about qualifications as distinctive if those qualifications do not relate to different work. Indeed, in this case, as mentioned above, there is no distinction among teachers in hiring, work assignment, or redundancy, based on QECO evaluation. Instead, qualifications parallel characteristics of individual teachers. The purpose of the grid system is to provide incentive for self-improvement and to eliminate the exercise of discretion in evaluating individual performance or merit. To focus now on the steps in the grid system is to focus on individual qualifications and not on the work itself. I note that the majority has focused on "whether elementary classroom teachers" meet the four criteria (para. 102); they rely on the claim that "teachers in one category require different educational qualifications than those teachers in another category." (para. 107.)

27. Taken from another perspective, the majority rely on the proposition that teachers in the various levels are required to have different qualifications. To what end? There is agreement that all teachers perform the same work. No teacher is **required** to have any greater or lesser qualifications. It is expected that A4 teachers will perform the work better (a merit consideration), but notwithstanding, a level D teacher is required to do all the same things. Parents, students, and administrators are entitled to expect competent performance of all tasks by a teacher at any level. Therefore, the requirement to do the work demanded is the same for all teachers.

28. Therefore, I find that all teachers possess similar qualifications.

Compensation:

29. The majority finds that the fourth criterion, "same compensation schedule, salary grade or range of salary rates" is made of three separate components. They determine also that if distinctions are found based upon any of the three, the criterion will not be met. This demonstrates the fundamental difference in approaches between the majority view and mine. Essentially, since the majority does not define "positions", they start with an undefined entity, then pare away pieces until they find those "parts" of the organization which seem sufficiently similar to be grouped together in a job class. This process seems highly susceptible to arbitrary decision making, and may be too easily manipulated for purposes unrelated to pay equity. By contrast, I propose that the exercise is to start by identifying positions, then applying the four criteria to determine which position or positions should be aggregated into a unit to be known as job class.

30. This approach is also supported by the language of the definition, which provides that a job class is "those positions in an establishment that have similar..." The approach is including, not excluding. As the majority have pointed out, for positions to be included together in a job class, they must meet all four criteria. By applying rules of construction and grammar relating to the use of "and" and "or", the fourth criterion includes three possibilities, and meeting any one of them satisfies the test. The majority reference to s.1(6) (one member job classes), which relies on excluding language, further supports my view.

31. As a consequence of the first approach, the majority is led to conclude "if the compensation schedule or the salary grade or the range of salary rates for positions are different, then the last component of the definition of job class is not met." (para. 113.) Against this, I conclude that if two positions are on the same compensation schedule, **or** the same salary grade **or** the same range of rates, then the positions can be grouped together in one job class (given that they meet the other three criteria).

32. This does not lead to unnecessarily large groupings of positions which are susceptible to masking systemic discrimination. Taken together with the other criteria for job class, this criterion ensures that those jobs which are normally grouped together in the employer's organization are subjected to evaluation to ensure equitable compensation. This, again, is in keeping with the general thrust of the legislation to apply a new yardstick to existing operations to ensure equity, and does not require artificial division of the operation.

33. It has been the constant view of these parties to consider the salary grid as a single schedule, not a compilation of seven schedules. Indeed, Schedule 'A' to the collective agreement is referred to as "The Elementary Grid". The various levels are not negotiated separately. In negotiations for the 1988-89 teaching year, percentage increases were negotiated across the board. The relationship between steps on the salary grid (D maximum as a percentage of A4 maximum, C maximum as a percentage of A4 maximum, etc.) is the same in the current collective agreement as it in 1969. This suggests that no negotiations have attempted to deal with the levels as distinctive steps.

34. This is consistent with the original approach developed by OSSTF. It was their expressed intention, subsequently adopted by the Federations, to develop, propose, negotiate and defend a singular approach to salaries for all teachers.

35. The creation of salary grades is a way to recognize hierarchical relationships between positions. It is integral to the development of grades that movement from one to the next requires the fiat of management. Otherwise, the impact of compensation as bearing some relationship to the value of work is entirely eliminated. Furthermore, employers would be unable to control costs, as employees would simply exercise their unfettered ability to rise to the highest paid grade without demonstrating a change in the contribution to their organization (and indeed the value of that contribution).

36. Such is not the case in this situation. Article IX of the Collective Agreement mandates that a teacher shall be placed on the salary schedule (I note, referred to as the schedule) in accordance with recognized teaching experience and new qualifications. Thus, once a teacher successfully completes the requirements for a higher QECO level, he or she is moved to the next level on the grid. No management discretion is exercised in the matter, reflecting that all points on the grid relate to the same work, position and contribution. Therefore, I find that the QECO levels are not seven grades, but one, available to all teachers.

37. There is evidence that at the root of this debate lies the question of whether the equivalencies granted by QECO for Ministry of Education courses are fair. Generally speaking, Ministry courses are more restricted in their application, reflecting a preference for university courses. The Federations would have us accept that the bias in favour of university courses results in systemic discrimination, inasmuch as Ministry courses are more readily available and accessible to women who may have other responsibilities. The extent that women are disproportionately represented in any of the levels is not a pay equity problem, but may be one of employment equity. Similarly, the reference to the statistic that shows that female teachers earn 84% of male teacher earnings is misleading since the statistic includes all teachers including all PARs. PARs are disproportionately populated by males, who earn more for their additional responsibilities. QECO itself is managed by the Federations.

38. The Board and the Federations (each Federation separately represented) are jointly pursuing steps to facilitate advancement. The evidence indicates that between September 1984 and June 1989, the Wentworth Board has spent $847,934 (annualized) on increased salaries for 246 women who have upgraded their qualifications, compared with $262,023 for 68 men who have also upgraded their qualifications. This represents a serious attempt to remedy any systemic discrimination that might exist in relation to employment equity.

39. Therefore, I conclude that teachers are paid on the same "compensation schedule, salary grade, or range of salary rates."

40. Consequently, I would find that the job class is all elementary classroom teachers employed by the Board. This is so, whether one finds that all elementary teachers are in a single position, or by applying the four criteria for job class to teachers.

BARGAINING UNIT

41. Section 14 (1) of the *Pay Equity Act, 1987* states

> 14.-(1) In an establishment in which any of the employees are represented by a bargaining agent, there shall be a pay equity plan for each bargaining unit and a pay equity plan for that part of the establishment that is not in any bargaining unit.

42. Section 1(1) of the *Pay Equity Act, 1987* defines

> "bargaining agent" [to] mean[s] a trade union as defined in the *Labour Relations Act* that has the status of exclusive bargaining agent under that Act in respect of any bargaining unit or units in an establishment and includes an organization representing employees to whom

> this Act applies where such organization has exclusive bargaining rights under any other Act in respect of such employees.

43. The term "establishment" is also defined.

44. This definition reinforces the fundamental characteristic of bargaining agency, as enshrined in virtually all labour relations legislation: exclucivity. Before embarking on the major objection to this part of the decision, I point out that, if the Federations are not found to have exclusive bargaining rights for their respective units (according to their mandating statute), then they arguably may not have status under the *Pay Equity Act, 1987*. The employer may not be obligated to conduct negotiations with the Federations for the pay equity plan, nor would the Federations be a party before this Tribunal (s.32(1)).

45. In the normal case, a trade union may be certified as bargaining agent for many units. It is not unusual, as well, for a single employer to have one trade union certified as bargaining agent to represent several separate units of the employer's employees (for example, a unit for full-time and another for part-time employees).

46. It is, by contrast, a contradiction of terms for more than one trade union or more than one bargaining agent to be certified as "exclusive" bargaining agent for a bargaining unit. Yet, that is the very result that the Federations would have us rule.

47. On this question, I find that there are two bargaining agents, and also two bargaining units for which pay equity plans must be developed.

Reasons:

48. Collective bargaining by various teacher federations on behalf of teachers, generally, is regulated by the *School Boards and Teachers Collective Negotiations Act*, R.S.O. 1980, c.464. (Other teachers, excluding those with whom we are concerned in this case, who are not covered under the *School Boards and Teachers Collective Negotiations Act*, are covered under the *Labour Relations Act*, R.S.O. 1980, c.228 as amended.) There are significant differences between the two pieces of legislation.

49. The Federations rely on the jurisprudence of the Ontario Labour Relations Board to support the proposition that the scope of the collective agreement and the practice of the parties effectively overrides the bargaining certificate under which those bargaining rights are first granted. This is highlighted by a decision of the Ontario Labour Relations Board *Canadian Union of Industrial Workers v. Gilbarco Canada Ltd.*, [1971] O.L.R.B. Rep. March 155, in which the Board found at p. 157

> The parties [to a collective agreement] are free to amend, alter, extend or abridge the bargaining rights contained in the certificate... In effect the collective agreement supplants the rights given by the Board's certificate and the Board's certificate is spent once the collective agreement is signed.

50. Collective negotiations for and by teachers are supervised by the Education Relations Commission (the "ERC"). We ought to afford great respect to decisions of the ERC as they are specialist in their arena.

51. In the decision *Hamilton-Wentworth Unit Ontario English Catholic Teachers' Association, et al. and The Hamilton-Wentworth Roman Catholic School Board*, (21 May 1987) (ERC) [unreported] at page 22, (para 46) it was the view "that bargaining units or structures are determined by both section 1(d) and section 1(c)" [of the *School Boards and Teachers Collective Negotiations Act*]. Section 1(c) defines "board":

> (c) "board" means a board of education, public school board, secondary school board, Roman Catholic separate school board or Protestant separate school board and includes a divisional board of education;

and section 1(d) defines "branch affiliate":

> (d) "branch affiliate" means an organization composed of all the teachers employed by a board who are members of the same affiliate.

Section 1(a) defines "affiliate" to mean the five province-wide teacher federations. Apparently, s.4 of that *Act* does not determine bargaining unit.

52. Therefore, these terms are statutory; they cannot be applied, except as determined by the statute. This view is also taken in an earlier decision. In *OECTA and AEFO v. The Cochrane-Iroquois Falls Roman Catholic Separate School Board*, (28 July 1986), (ERC) [unreported], the ERC was dealing with an attempt by the local Board to require two branch affiliates to negotiate together. This demand was based on the past practice of the parties. The Chair wrote at page 15

> [I]t is the position of the Commission that recognition procedures and the structure of bargaining are not matters which the parties may contractualize and enforce as any other term of employment. Rather, such matters are the subject of explicit statutory regulation and fall within the Commission's exclusive jurisdiction.

53. For further background, I look to "The Report of a Commission to Review the Collective Negotiation Process Between Teachers and School Boards" (the Matthews Report). This report reviewed the state of collective negotiations in 1980, and prepared recommendations for change, as appropriate. While it is not determinative, it does reflect how teachers and boards of education look upon the question of bargaining unit, and may therefore be helpful in deciding this question. I note that the statutory framework for collective bargaining has not changed since the report issued.

54. It is of significance that the section on "Bargaining Unit Problems" deals first with issues of composition of the bargaining unit (questions of inclusion of Principals, Vice Principals, occasional teachers, and so forth), and then subsequently, with questions of "Joint bargaining" (including various affiliates negotiating jointly for, say, all teachers of a board in an elementary panel).

55. From this, it is clear that the term bargaining unit refers to the unit of all statutory members of a branch affiliate (which is the exclusive bargaining agent) employed by a board to teach. On this basis, I find that there are two bargaining units in question, and two pay equity plans required.

56. The majority writes that "there is no necessary unity between bargaining agent and bargaining unit." (para. 60) While it is true that one bargaining agent can have representation rights for more than one unit, an employee cannot be represented by more than one exclusive agent. In this case, females are, according to the by-laws of the Ontario Teachers' Federation, members of

FWTAO. They may also become members of OPSTF. Men may not be members of FWTAO. In the case of a female who takes membership in OPSTF, it is not clear against whom she may enforce representation rights. In any event, she cannot be represented with finality or exclusivity by both. Furthermore, the majority has written that membership is not an issue in this case.

57. Further to the arguments above, the Federations point out that the two units in question here negotiate jointly for renewing collective agreements. Accordingly, we are urged to find that the two bargaining agents become "a party" (in the singular) and represent a singular "bargaining unit" made up of parts. I do not find this argument persuasive.

58. It is true that the branch affiliates of the Federations come together to negotiate for renewal of collective agreements. This has been the case without exception at these boards. The structure for doing this is quite well established, and finds expression in the Federations' handbooks, as well as in the law.

59. Section 4 (3) of the *School Boards and Teachers Collective Negotiations Act* specifies

> Notwithstanding subsection (1), two or more branch affiliates may act as one party in negotiations and procedures under this Act to make or renew an agreement or agreements with the same board.

60. In *OECTA and AEFO v. The Cochrane-Iroquois Falls Roman Catholic Separate School Board*, (28 July 1986), (ERC) [unreported], at page 2, it is said "there has been one set of negotiations and one collective agreement rather than two." The facts in that case in respect of the conduct of negotiations are not different from those in this case.

61. However, the question remains as to the status of the branch affiliates who enter into such an agreement. Does the fact that they have entered into a single collective agreement mean that they now share a single bargaining unit? I think not.

62. The majority writes (para. 59) "the *Pay Equity Act, 1987* acknowledges that the status of bargaining agent is determined under other statutes", [in this case the *School Boards and Teachers Collective Negotiation Act*]. Further, they write, "Other statutes ... set out a scheme for collective bargaining and the role of the bargaining agent." (also para. 59) The role of bargaining agent is set out for the branch affiliates in the *School Boards and Teachers Collective Negotiation Act*. The Federations submit that the cumulative effect of s.4(3) and other sections of the *Act*, is that the two bargaining agents, acting together, become a (single) party. While some sections of the *School Boards and Teachers Collective Negotiation Act* seem to anticipate procedures with (only) two parties, there are others which recognize, protect and obligate the individual federations, regardless of their approach to negotiations. Based on the *Act*, together with the ERC decisions above, I find that, as a matter of law, the two federations remain separate, though acting as a party and executing a single collective agreement.

63. In light of this, we must accept the status of these agents as we find them. It is inappropriate for the Tribunal to make a determination of exclusive bargaining agent, applying the purpose of the *Pay Equity Act, 1987*, without assuring that the *School Boards and Teachers Collective Negotiation Act* is first correctly applied.

64. The collective agreement ensures the ability of each Federation to meet its statutory obligation to represent its members. Seniority lists, once prepared, are sent to each individual Federation (article 22.14). Federation fees are deducted and remitted to the Ontario Teachers' Federation (article 24.01); the fees for each of FWTAO and OPSTF are distinct, and set by each Federation independently. Each branch affiliate is represented separately on various committees (including effects of special education, affirmative action, pay equity , occupational health and safety) (article 25.09 and others). Each branch affiliate has its own grievance officer, and each branch affiliate is entitled to represent member grievors (article 26). Leaves of absence are provided for and granted to Presidents and officers of each branch affiliate (article 28.01). The collective agreement is signed by each branch affiliate (article 32.02).

65. The process leading to this is complex. As outlined in the decision by the majority, ratification of renewal collective agreements is done on a basis which does not distinguish along the lines of affiliate membership. However, the nature and extent of the consultations and involvement of the individual branch affiliates and the provincial federations in the negotiation process, is such that, in reality, Affiliate interests are protected.

66. The individual branch affiliates are equally represented on the Economic Policy Committee (EPC), the committee which is formed to represent the teachers in negotiations with the Boards. If one of the two branch affiliates were to find proposed terms for amendment to the collective agreement to be unacceptable, they have, through their equal representation, the ability to foreclose acceptance. The provincial bodies of OPSTF and FWTAO maintain strict policies requiring branch affiliate liaison during bargaining. While the ratification process, therefore, suggests that the membership of the individual branch affiliates is not distinguished, the full process reveals the ability of the affiliates and each branch affiliate to represent and protect its own interests.

67. In *Cochrane-Iroquois Falls*, the ERC wrote

> It has long been recognized in Canadian public policy that the collective bargaining process involves, and logically should involve, the pursuit of self-interest by each of the parties [the two branch affiliates]. While the parties are free under the provisions of the Act to join others in that pursuit, they are not required to do so. (page 15)
>
> ...
>
> As well, this position [as proposed by the Board in that case, to require the Branch Affiliates to negotiate together] would foreclose the ability of the Branch Affiliates *throughout the negotiation process* to pursue their own interests. This is a serious restriction. (page 17)

68. Therefore, the entire regime governing collective bargaining among these parties assures that, in spite of a decision by branch affilaites to negotiate together for renewal of agreements, they are necessarily free and required to remain separate and distinct parties. I note further, the definition for "party" in the *School Boards and Teachers Collective Negotiation Act*, says "'party' means a board or a branch affiliate."

69. The majority finds, however, (para. 74) "that for purposes of the *Pay Equity Act, 1987*, the branch affiliates acting jointly constitute the bargaining agent." The only vehicle for this joint action is the EPC. The EPC is an ad hoc committee constituted only for the purpose of negotiating a renewal collective agreement; it is subservient to both the local executives of the branch affiliates

and the provincial Federations; it plays no role in representing employee interests during the term of the collective agreement; it has no responsibility under the *School Boards and Teachers Collective Negotiation Act* (s.5). It has none of the attributes of exclusive bargaining agent. Naming the EPC the bargaining agent changes the words of s.4(3) of that *Act* from "act as one party" to "be the party", which is significant and, I believe, not intended by the legislature. In short, this decision creates a totally artificial bargaining agent which exists nowhere in the real world.

70. This is in contrast to the collective agreement between the Carleton Board of Education and the Teachers' Federation of Carleton, comprising members of FWTAO and OPSTF and AEFO. The recognition clause in that collective agreement is notably different

> 1.01 The Board recognizes the "Teachers Federation of Carleton", (T.F.C.), which represents the Branch Affiliates, including the T.F.C. members with l'Association des enseignantes et des enseignants franco-ontariens, as the sole and exclusive bargaining agent for teachers as defined herein and in the employ of the Board.

If indeed, the branch affiliates are in any sense able to merge their rights , it would seem this may have been done in Ottawa. However, it cannot be said that the branch affiliates in the cases before us turned their mind to this possibility nor did they succeed in negotiating such a provision with the Boards.

71. Finally, the Federations have had significant differences among themselves. It is the expressed intention of OPSTF to seek a single federation with statutory right to represent elementary (public) school teachers in Ontario. To this end, they have opened up the membership to permit voluntary membership by females, otherwise members of FWTAO. Indeed, some of these women who have taken up voluntary membership in OPSTF have taken on leadership roles; a woman has acted as President of OPSTF.

72. Two long and extensively fought legal actions have arisen in this context. They are *Federation of Womens Teachers' Association of Ontario et al and Minister of Consumer and Commercial Relations et al.* (1984), 46 O.R. (2d) 94 (H.C.J.); affirmed (1984), 46 O.R. (2d) 645 (Div.Ct.); and *Tomen and OPSTF v. FWTAO et al.* (1987), 61 O.R. (2d) 489 (H.C.J.); affd. (16 August 1989), (Ont. C.A.) [unreported]. See also *Re Federation of Women Teachers' Association of Ontario and Ontario Human Rights Commission et al.* (1988), 67 O.R. (2d) 492 (Div. Ct.). In both cases, FWTAO took vigorous positions opposing those expressed by OPSTF.

73. This opposition is perhaps best expressed by a newsletter article published by FWTAO. In the February 19, 1988 edition (Number 12) of FWTAO "Postehaste", in an article entitled "We're fighting for our very Existence", the Federation writes

> FWTAO has always cooperated with OPSTF in areas of mutual interest - salary negotiations for example. We stop short of amalgamation. The interest is not mutual.

74. Accordingly, FWTAO and OPSTF are separate entities, with separate status in law, and clearly separate interests. They come together to negotiate collective agreements, in Hamilton-Wentworth, as well as across the province. However, they remain separate throughout, with an individual responsibility to protect and represent their respective, defined memberships.

75. Finally, the *Pay Equity Act, 1987* provides some further insight into the debate. The following sections pertain:

> 2.-(1) Two or more employers and the bargaining agents or agents for their employees who come together to negotiate a central agreement, may agree that, for the purposes of a pay equity plan, all the employees constitute a single establishment and the employers shall be considered a single employer.
>
> (3) Notwithstanding that the employees of two or more employers are considered to be one establishment under subsection (1) or (2), each employer is responsible for implementing and maintaining the pay equity plan with respect to the employer's employees.
>
> 7.-(1) Every employer shall establish and maintain compensation practices that provide for pay equity in every establishment of the employer.
>
> (2) No employer or bargaining agent shall bargain for or agree to compensation practices that, if adopted, would cause a contravention of subsection (1).
>
> 25.-(2)(a) where it finds that an employer or a bargaining agent has failed to comply with Part II, may order that a review officer prepare a pay equity plan for the employer's establishment and that the employer and the bargaining agent, if any, or either of them, pay all of the costs of preparing the plan;

76. These sections confirm a correlation between bargaining agent and bargaining unit. They accord with the view that trade unions may have bargaining rights for more than one bargaining unit. Sections 2(1) and (2) of the *Act* specifically empower two or more employers (who already negotiate centrally) to continue this practice for pay equity purposes. This may only be done by mutual agreement, including that of the bargaining agents involved. I note that the legislators did not provide a parallel provision for bargaining agents and find, therefore that no parallel authority exists for them. Furthermore, in the case of "merged" employers, the obligation for pay equity rests with the constituent employers which parallels, again, the *School Boards and Teachers Collective Negotiation Act*.

77. Reference to structures for the separate school systems is not helpful, either. The majority point out that OECTA (and AEFO, where it is present) represent both male and female teachers together, such that the pay equity plan would allow comparisons of the teacher job class to others. While this may be so, it is not uncommon to have a single bargaining unit for all teachers in a separate school system from Kindergarten through to Grade 12/OAC. Therefore, one comparison now available to the public school elementary teachers (secondary school teachers) is not available to the separate school teachers. Furthermore, the job class demographics may be different, with the result that no comparisons are made. Finally, the question of the number of pay equity plans within a separate school board is not before us.

Conclusion:

78. For all the reasons above, therefore, I conclude that the Federations are separate bargaining agents, and have rights with respect to separate bargaining units. This has been the law applicable to the elementary school community; it has also been the practice between these parties; the Federations have been accorded separate and distinct privileges on that basis. It is incorrect and fundamentally unfair to require these employers now to deal with these two entities as if one. I would amend the Tribunal's decision accordingly.

0008-89 0011-89 Ontario Nurses' Association Applicant v. **Women's College Hospital** Respondent; Women's College Hospital Applicant v. Ontario Nurses' Association Respondent (No. 2)

Before: Raphael Palumbo, Vice-Chair and Members Susan Genge and Sharon Laing

Appearances: Mary Cornish, Felicity Briggs, Valerie MacDonald and Lori Newton for the Ontario Nurses' Association; Janice Baker for Women's College Hospital; Anneli LeGault and Don King for Peat Marwick Stevenson, Kellogg

Practice and Procedure - Reconsideration

PMS&K, a consulting company, applied to intervene in an application in which the Aiken Plan, a job evaluation system which it had designed and sold, was involved. That application was denied in a decision of the Tribunal dated October, 17, 1989 [now reported, *Women's College Hospital (No.1)* (1989), 1 P.E.R. 53]. PMS&K applied to the Tribunal to reconsider that decision. After PMS&K had filed this second application, but before the merits were heard, the Applicant Union in the case involving the plan, filed several other applications all of which were premised on the same ground: that each of the respondents had violated the *Act* by proposing a gender-biased comparison system. The Union sought to have these other applications consolidated with its initial application. The Tribunal held with respect to the procedural motion that two of the new applications would be heard together with the initial application, and the remaining ones were adjourned *sine die*.

The Tribunal denied the application to reconsider its earlier decision.

The clear implication of s.30(1) of the *Act* is that decisions of the Tribunal are meant to be final. Under s.30(2), the Tribunal has discretion to reconsider its decisions. This discretion should only be exercised where there are compelling and extraordinary circumstances which make it appropriate to do so because otherwise the goals of finality and expedition will be jeopardized. In reviewing the jurisprudence, the principles and tests developed in other contexts can best be summarized by asking the question: "Is there some reason to interfere in *this case* which has already received a decision which was intended to be final?" In answering this question, the following factors may be useful: (1) whether there was evidence available at the time of the hearing which was not presented because it was unavailable and which is likely to make a substantial difference to the outcome; (2) whether there has been a change in circumstances since the decision such that the decision should not stand; and (3) whether the decision is wrong in law.

In applying these factors, the Tribunal finds that reconsideration is inappropriate in this case. The fact that ONA has made several similar applications involving the Aiken Plan does not alter the issue before the Tribunal which is the gender neutrality of the proposals put forward by Women's College Hospital, and not the gender neutrality of the Aiken Plan. Even if ONA's intention is to attack the Aiken Plan in general, we have made it abundantly clear that that is not the issue in the Women's College Hospital Case. Our decision on the merits in this case will focus on the particular workplace. The impact which this decision might have on PMS&K and other hospitals using the Aiken Plan was argued at the original hearing and is not a new fact or event. Moreover, this panel followed the Tribunal's policy on intervention, and found no reason to part from that policy. Finally, it is our view that our interpretation of s.29 of the *Act* is correct in law.

Tribunal Member Sharon Laing dissented:

While the majority's approach to reconsideration is correct, in applying the second factor to the facts of this case, it is appropriate to entertain the application for reconsideration because there has been a sufficient change in circumstances.

At first instance, the issue presented to the Tribunal was targeted at one bargaining unit and one employer. In light of the nature of ONA's allegations concerning the gender neutrality of the Aiken Plan, the fact that it sought to have those applications consolidated, and the fact that some of its applications will now be heard together, it is unrealistic to claim that the Tribunal's focus will remain on the particular workplaces in question.

Pratique et procédure - Réexamen

PMS&K, un cabinet d'experts-conseils, a présenté une requête en intervention dans le cadre d'une requête concernant le plan Aiken, un mode d'évaluation d'emplois qu'il a conçu et mis en vente. Dans sa décision du 17 octobre 1989 [citée maintenant dans *Women's College Hospital (No.1)*(1989), 1 P.E.R.53], le Tribunal a rejeté la requête. Le cabinet a présenté au Tribunal une requête en réexamen de sa décision. Après le dépôt de la deuxième requête mais avant l'audition de son bien-fondé, le syndicat requérant dans l'affaire mettant en cause le plan a déposé plusieurs autres requêtes toutes fondées sur le même motif : chacun des intimés avait enfreint la Loi en proposant un système sexiste de comparaison. Le syndicat a voulu faire réunir ces autres requêtes à sa requête initiale. Le Tribunal a décidé en ce qui concerne la motion de procédure que deux des nouvelles requêtes seraient entendues en même temps que la requête initiale et que les autres seraient reportées à une date indéterminée.

Le Tribunal n'a pas accueilli la requête en réexamen de sa décision antérieure.

La conséquence évidente du paragraphe 30 (1) de la Loi est que les décisions du Tribunal sont définitives. En vertu du paragraphe 30 (2), le Tribunal jouit du pouvoir discrétionnaire de réexaminer ses décisions. Ce pouvoir ne devrait être exercé que si des circonstances extraordinaires le justifient sinon les objectifs concernant le caractère définitif et diligent des travaux du Tribunal seront compromis. L'étude de la jurisprudence révèle que la meilleure façon de résumer les principes et les tests élaborés dans d'autres contextes est de poser la question suivante : «Existe-t-il une raison de revenir sur cette cause qui a déjà fait l'objet d'une décision devant être définitive?» La réponse à cette question peut tenir compte des facteurs suivants : 1) existait-t-il des preuves disponibles lors de l'audience qui n'ont pas été présentées parce qu'elles n'étaient pas disponibles et qui sont susceptibles de modifier considérablement l'issue de l'instance; 2) des changements sont- ils survenus mettant fin à la validité de la décision; 3) la décision est-elle erronée du point de vue du droit.

Lorsqu'il applique ces facteurs, le Tribunal conclut qu'il n'est pas approprié de réexaminer la décision qu'il a rendue dans cette cause. La présentation, par l'«Ontario Nurses Association» (ONA), de plusieurs requêtes semblables concernant le plan Aiken ne modifie en rien le problème dont est saisi le Tribunal, à savoir l'étude du caractère non sexiste des propositions du Women's College Hospital, et non l'étude du caractère non sexiste du plan Aiken. Même si l'objectif de l'ONA est d'attaquer le plan Aiken en général, nous avons précisé assez souvent que le plan ne constitue pas le point litigieux dans l'affaire du Women's College Hospital. Notre décision sur le bien-fondé de cette cause sera axée sur le milieu de travail particulier. Les répercussions éventuelles de cette décision sur le cabinet en question et d'autres hôpitaux se servant du plan Aiken ont fait l'objet de discussions lors de la première audience et ne constituent pas un fait nouveau. En outre, le présent comité a suivi les principes directeurs du Tribunal en ce qui concerne l'intervention et n'a pas jugé qu'il y avait lieu d'y déroger. Finalement, nous estimons que notre interprétation de l'article 29 de la Loi est exacte du point de vue du droit.

Dissentiment de Sharon Laing, membre du Tribunal

La méthode suivie par la majorité des membres en ce qui concerne le réexamen de la décision du Tribunal est correcte; il est toutefois approprié, en ce qui concerne l'application du deuxième critère aux faits de la cause, de recevoir la requête en réexamen étant donné que les circonstances ont considérablement changé. Lors de la première instance, la question dont était saisi le Tribunal visait une unité de négociation et un employeur. Compte tenu de la nature des allégations de l'ONA concernant le caractère non sexiste du plan Aiken, de la tentative de l'ONA de faire réunir ces requêtes, et du fait que certaines d'entre elles seront entendues simultanément, il n'est pas réaliste de prétendre que l'examen du Tribunal continuera de porter sur les milieux de travail en question.

Cases Referred To

Decision No. 339R (24 September 1986), (W.C.A.T.) [unreported].
Decision No. 72R2 (10 December 1986), (W.C.A.T.) [unreported].
Haldimand-Norfolk (No.1) (1989), 1 P.E.R. 1 .
Haldimand-Norfolk (No.5) (1989), 1 P.E.R. 77.
Haldimand-Norfolk and Ontario Nurses' Association, Re (1989), 1 P.E.R. 188 (Div. Ct.).
Imperial Tobacco, [1974] O.L.R.B. Rep. Sept. 609.
John Entwhistle Construction Limited, [1979] O.L.R.B. Rep. Nov. 1096.
K-Mart Canada Limited Peterborough, [1981] O.L.R.B. Rep. Feb. 185.
Middlesex and London (1989), 1 P.E.R. 89.
Metropolitan Toronto Library Board (1989), 1 P.E.R. 112.
Wentworth County Board of Education (1990), 1 P.E.R. 132.
Women's College Hospital (No.1) (1989), 1 P.E.R. 53.

Statutes Referred To

Pay Equity Act, 1987, S.O. 1987, c.34, ss.14, 29, 32.
Statutory Powers Procedure Act, R.S.O. 1980, c.484, s.5.

Rules Referred To

Pay Equity Hearings Tribunal, *Rules of Practice*, Rule 13.

DECISION OF R. PALUMBO, VICE-CHAIR AND TRIBUNAL MEMBER, S. GENGE, JANUARY 9, 1990:

1. By letter dated October 31, 1989 Counsel for Peat Marwick, Stevenson & Kellogg (formerly Stevenson, Kellogg, Ernst & Whinney, herein referred to as "Peat Marwick") made a request pursuant to Rule 13 of the Tribunal's Rules of Practice for reconsideration of the Tribunal's unanimous decision dated October 17, 1989 [now reported as *Women's College Hospital (No.1)* (1989) 1 P.E.R. 53]. By that decision, the Tribunal refused Peat Marwick's application for intervenor party status in Application Numbers 0008-89 and 0011-89 between the Ontario Nurses' Association ("ONA") and Women's College Hospital. The Tribunal's reasons for its decisions were released on November 15, 1989.

2. The reconsideration application was heard by the Tribunal on December 20, 1989. Prior to hearing argument on that application, the Tribunal heard submissions on December 18, 1989 regarding certain procedural motions brought by ONA. In its Ruling dated December 19, 1989, the Tribunal made the following decisions:

(i) Application Numbers 0008-89 and 0011-89 between ONA and Women's College Hospital will be heard together with Application Numbers 0018-89 and 0034-89 between ONA and Sunnybrook Medical Centre and Application Numbers 0029-89 and 0036-89 between ONA and North York General Hospital.

(ii) Ten other Applications filed by ONA with the Tribunal following the decision of October 17, 1989 were adjourned *sine die*. These Applications involved ONA and the following Hospitals: Winchester District Memorial Hospital, Riverside District Memorial Hospital, Salvation Army Grace Hospital, Smith Falls Community Hospital, Children's Hospital of Eastern Ontario, Brockville General Hospital, Kemptville District Hospital, The Metropolitan General Hospital, Queensway General Hospital, and Lennox and Addington County General Hospital.

(iii) Subsequent Applications filed with the Tribunal concerning matters similar to those raised in the Applications referred to in sub-paragraph (ii) above would be dealt with by the Tribunal on an individual basis.

3. In each Application referred to above, ONA alleged that the Respondent Hospital had, among other things, breached the *Pay Equity Act, 1987* R.S.O. 1980 c. 34 (the "Act") by proposing a gender-biased comparison system and pay equity plan.

4. The Tribunal's jurisdiction to reconsider its decisions is found in section 30(2) of the *Act*:

> 30-(2) The Hearings Tribunal may at any time, if it considers it advisable to do so, reconsider a decision or order made by it and vary or revoke the order.

5. The *Act* also contains a strong privative clause. Section 30(1) provides as follows:

> 30-(1) The Hearings Tribunal has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it and the action or decision of the Hearings Tribunal thereon is final and conclusive for all purposes.

6. The clear implication from the wording of section 30(1) is that decisions of the Tribunal are meant to be final. Nevertheless, the enactment of section 30(2) is a recognition that in certain circumstances it may be appropriate for the Tribunal to reconsider its decisions or orders. However, this will happen only where the Tribunal "considers it advisable to do so". In other words, a party is not entitled as of right to a reconsideration of a Tribunal decision. Rather, a discretion lies with the Tribunal to reconsider a particular decision.

7. In our view, the Tribunal's discretion to reconsider a decision ought to be exercised only where there are compelling and extraordinary circumstances which make it appropriate to do so. To hold otherwise would be to jeopardize the Tribunal's goal of bringing finality to matters in an expeditious manner. It is also important to recognize that the labour relations community has an expectation that the Tribunal will be consistent in its decisions and will bring finality to matters which come before it.

8. At the hearing, counsel reviewed the principles adopted by other boards and tribunals regarding their reconsideration provisions. We found the practices followed by the Ontario Labour Relations Board ("OLRB") and the Workers' Compensation Appeals Tribunal ("WCAT") to be particularly helpful. The language of the statutory provisions under which they operate is similar to that found in section 30(2) of the *Act*. The Labour Board and Workers' Compensation Appeals Tribunal jurisprudence is set out below:

(i) *The Ontario Labour Relations Board*

9. In *Imperial Tobacco*, [1974] OLRB Rep. Sept. 609, the Ontario Labour Relations Board stated at page 609:

> However, this jurisdiction is very carefully and cautiously exercised by the Board in that free recourse to the Board after the initial disposition of a matter would substantially undermine those values of speed and economy associated with the administrative practice of this Board. In other words, except for exceptional circumstances, litigation between the parties ought not to be prolonged. This principle was approved of in International Nickel.

10. In *K-Mart Canada Limited Peterborough* [1981] OLRB Rep. February 185, the Board stated at page 185:

> To avoid abuse of the reconsideration provision and bring some finality to its adjudicated decisions the Board has adopted principles not unlike those of the courts. The Board will not normally accede to a request to reconsider unless the party requesting reconsideration intends to adduce new evidence which was not previously available to them by the exercise of due diligence, and then only where such additional evidence, if proved, would be likely to make a substantial difference to the outcome of the case. Reconsideration is therefore generally restricted to allowing a party to adduce evidence or make representations which it did not have a previous opportunity to raise. The Board may also consider such factors as the motives for the request for reconsideration in light of a party's conduct, and the resulting prejudice to another party if the case is reopened.

11. In *John Entwhistle Construction Limited*, [1979] OLRB Rep. November 1096, the Board once again reviewed the basis upon which it will reconsider a decision. At page 1097 the Board stated:

> The Board exercises its jurisdiction under section 95(1) of the Act to reconsider and vary or revoke any decision with care and caution in order not to undermine the finality of its decisions and, as stated by the Board in Canadian Union of General Employees, [1975] OLRB Rep. April 320:
>
> > Generally, the Board will not reconsider a decision unless a party proposes to adduce new evidence which could not previously have been obtained by reasonable diligence and the new evidence is such that, if adduced, it would be practically conclusive or a party wishes to make representations or objections not already considered by the Board that he had no opportunity to raise previously.

(ii) *Workers' Compensation Appeals Tribunal*

12. The leading WCAT decision on reconsideration is *Decision No. 72R2* (December, 1986). In that case, the Panel hearing the reconsideration application stated at pages 14–15:

> Our consideration of the various tests proposed leads us to suggest two questions which can be put in non-legal language which need "yes" answers before the idea of granting a hearing for reconsideration should be considered any further. These are:
>
> 1. Is there any reason to believe there is something wrong with the original decision?
> 2. Would the reasons given by the person wanting the reconsideration make the result different?

If both those questions receive a "yes" answer then it would be necessary to ask *what* difference it would make. Those specific things should then be looked at in some detail to see if they are sufficiently exceptional when balanced against the importance of decisions being final or alleged prejudice to one side or the other to indicate the previous decision should be re-opened.

13. In WCAT *Decision No. 339* (September, 1986), the Panel stated at pages 1–2:

> Because of the intended finality of the decision-making process, it is our view that reconsideration requests may be granted only in exceptional circumstances. Such requests are not "as of right" and are not equivalent to an appeal.
>
> The question of what constitutes "exceptional circumstances" is one that will develop over time from individual cases. Generally, however, it may be that circumstances that will constitute grounds for the Tribunal to grant reconsideration requests are circumstances where for example, important new evidence becomes available that was not available, for substantial reasons, at the hearing or there is an undisputed error of fact in the decision, or a clear error of law.

14. In our view, the principles and tests adopted by the Labour Board and WCAT can be best summarized by asking the question posed by the Panel in WCAT Decision 72R2 at page 18 of its decision: "is there some reason to interfere in *this case* which has already received a decision which was intended to be final?" In answering this question we believe that the following factors may be useful:

(i) Was there evidence at the time of the hearing that was not presented because it was unavailable to the party asking for reconsideration, and which is likely to make a substantial difference to the outcome of the case?

(ii) Since the decision, has there been a change in circumstances such that the decision should not stand?

(iii) Is the decision wrong in law?

15. The Tribunal considered Peat Marwick's request for reconsideration in light of the above-noted factors and we are of the opinion that reconsideration of our decision of October 17, 1989 is inappropriate in the circumstances of this case. Nevertheless, we wish to review briefly the grounds upon which Peat Marwick bases its application.

16. Counsel for Peat Marwick, Ms. LeGault, submitted that since the initial September 13, 1989 hearing date there have been some very significant developments which make it appropriate for the Tribunal to reconsider its decision of October 17, 1989. She submitted that the Applications filed by ONA against the various Hospitals noted above, all state that the Aiken Plan is so fundamentally flawed that it is not appropriate for pay equity negotiations. Therefore, the issue in those cases is focused on the Aiken Plan itself. She contended that the focus of ONA's Application in the Women's College Hospital case is not, as the Tribunal has found, the proposal put forward by the Hospital regarding a comparison system to be used in preparing a pay equity plan, but rather the Aiken Plan itself. Ms. LeGault argued that since the Tribunal's decision was so clearly predicated on the fact that ONA's complaint involved the proposals made by Women's College Hospital, there is reason to believe that the decision could be wrong.

17. In our reasons dated November 15, 1989, we stated at paragraph 81 that "the issue before the Tribunal in this case is the gender neutrality of the proposals put forward by the Hospital regarding the comparison system to be used to evaluate the jobs in that particular workplace. The issue is not the gender neutrality of the Aiken Plan." We based our decision on the specific language of subsections 14(1) and 14(2)(a) which focuses on the negotiation of a "gender neutral

comparison system" rather than on any specific job evaluation plan. The language of subsections 14(1)and (2)(a) has not changed, the written reasons found at paragraph 77 of our decision of November 15, 1989 still hold, and therefore the issue in this case remains the gender neutrality of the proposals put forward by Women's College Hospital and not the gender neutrality of the Aiken Plan.

18. In our view, the fact that ONA has decided to bring further Applications to the Tribunal against other Hospitals does not change what the issue is in the Women's College Hospital case. Admittedly, there may be a perception that ONA is attacking the Aiken Plan in general rather than focusing on individual workplaces and the comparison system to be applied to them. Indeed, both Ms. LeGault and Ms. Baker, Counsel for Women's College Hospital, made much of the language used by ONA in their pleadings. For example, they referred to ONA's combined Response and Reply in the Sunnybrook Medical Centre case. At paragraph 3 ONA states:

> Further, ONA is of the view that the SKEW methodology is so fundamentally flawed that it is not appropriate for negotiations to focus on its amendment but rather should focus on agreeing on a different comparison system. We understand that SKEW will not permit its system to be substantially amended. See Schedule "A" to the document for an outline of ONA's concerns with respect to SKEW.

19. Ms. Baker submitted that this statement is also found in other Replies filed by ONA and belies ONA's original submissions that the issue of general neutrality is strictly between ONA and the employer Hospital in each case.

20. It appears from the various Applications filed by ONA that in each case the proposal put forward by the Hospital is based on the job evaluation plan or methodology supplied by Peat Marwick. Ms. Cornish submitted that the methodology in question is being attacked because the employer Hospital in each case is putting forward a methodology which ONA believes is gender-biased. In other words, the employer Hospitals have proposed a particular comparison system which ONA believes is fundamentally flawed and in each case ONA has attacked it as being gender-biased.

21. In our view, the focus in each case ought to be on the particular proposal tabled by the employer Hospital at the bargaining table, because it is the employer who has rights and obligations under the *Act*. We should indicate that even if ONA's intention is to attack the Aiken Plan in general, we have made it abundantly clear that that is not the issue in the Women's College Hospital case. Contrary to the position taken by Tribunal Member Laing in paragraph 12 of her dissent, we do not recognize that the issue in the case is the Aiken Plan in general. We wish to emphasize that point. Our decision on the merits in this case will focus on the particular workplace and any remedy given to any party in this case will be restricted to the particular circumstances found at Women's College Hospital.

22. Ms. LeGault further submitted that the Tribunal's decision denying party status has had an unanticipated or unintended consequence on Peat Marwick. The numerous new Applications filed by ONA which deal with the Aiken Plan were not anticipated at the time of the hearing. She argued that since all the Applications are addressed to the Aiken Plan as the fundamental and key issue, and the link in all Applications, the consultant should be permitted to participate in the proceedings.

23. In our view, Peat Marwick's view of the magnitude of the issue in dispute in this case was before the Tribunal at the September 13, 1989 hearing date. Certainly, Ms. LeGault argued at that time that a decision by the Panel would not be limited to the Women's College Hospital workplace. As well, in Peat Marwick's Response to ONA's Application against Women's College Hospital, Peat Marwick clearly stated that a decision by the Tribunal in this case would affect it province-wide since the Aiken plan is in use in over 100 Ontario hospitals. She further submitted at the hearing that if Peat Marwick was added as a party intervenor, it would ensure that the issues arising out of the Aiken Plan would be dealt with and that further complaints by ONA against other hospitals could be avoided with respect to those issues.

24. While it is true that ONA did not file its Applications against the various Hospitals noted earlier until after the September 13, 1989 hearing date, nevertheless the Tribunal was informed of Peat Marwick's position on the impact a decision in this case would have on both Peat Marwick and employer Hospitals which are using the Aiken Plan. In our view, this is not a new fact or event which Peat Marwick was unable to argue at the original hearing.

25. Ms. LeGault further argued that the decision of October 17, 1989 and the reasons issued on November 15, 1989 set out a fundamental and new policy regarding intervention. With respect, this Panel was guided by the Ruling of the Tribunal in the *Haldimand-Norfolk* case dated June 26, 1989. In that case a consulting firm, William M. Mercer Ltd., was not permitted to intervene on the basis that the issue before the Tribunal was the gender-neutrality of the proposals put forward by the employer. In our view, therefore, this Panel did not establish a new policy on intervention but rather followed what has been Tribunal policy since June, 1989. Even so, we did not follow that policy blindly but examined whether in the circumstances of this case Peat Marwick should be allowed to intervene in these proceedings. While that policy is a major statement on intervention before Tribunal proceedings, we are not persuaded that it must be re-examined in this case. There must be compelling reasons to depart from that policy.

26. Ms. LeGault also submitted that the Tribunal has added other parties and intervenors in other proceedings before the Tribunal. In the *Haldimand-Norfolk (No. 1)* (April 25, 1989), 0001-89 (P.E.H.T.) [now reported as *Haldimand-Norfolk (No.1)* (1989) 1 P.E.R. 1], *Metropolitan Toronto (Municipality of) and Metropolitan Toronto Library Board* (December 5, 1989), 0009-89, (P.E.H.T.) [now reported as *Metroploitan Toronto Library Board* (1989) 1 P.E.R. 112], and *London (City of) and Middlesex (County of)* (November 1989), 0002-89, (P.E.H.T.) [now reported as *Middlesex and London* (1989) 1 P.E.R. 89] cases, the issue before the Tribunal was the identity of the employer in each case. That type of case is fundamentally and qualitatively different than this case. Section 32(1) of the *Act* specifies that the "employer" is a party to proceedings before the Tribunal. In the employer cases, the object is to determine who the employer is and therefore who the party before the Tribunal is. It is therefore not unusual to have several participants in the proceedings for the purposes of determining who the employer is. Employer cases are also different than the case before us in that the inquiry is essentially a preliminary matter; that is, it is only after an employer is identified that it has rights or obligations under the *Act*.

27. Ms. Baker referred the Tribunal to the *Wentworth County Board of Education* (Tribunal File 0004-89) [now reported as *Wentworth County Board of Education* (1990) 1 P.E.R. 132] case. The Panel hearing that case allowed the Ontario Secondary School Teachers Federation (the "OSSTF") to intervene and participate on a limited basis in the proceedings. In that case, the Panel issued on oral Ruling in which they stated that the OSSTF was neither a party under section 32(1) of the *Pay Equity Act, 1987*, nor were they a party under section 5 of the *Statutory Power Procedure Act*, R.S.O. 1980, c.484. Nevertheless, the majority allowed OSSTF to participate in the proceedings with respect to the historical development of the payment of teachers. No written reasons have yet been issued for this decision and therefore that case is not helpful in the matter before us.

28. Ms. LeGault submitted that subsequent to the September 13, 1989 hearing date, the Divisional Court heard a motion brought by the Metropolitan Toronto Board of Commissioners of Police and the Municipal Police Authorities seeking intervention in a judicial review application between the Haldimand-Norfolk Regional Board of Commissioners of Police and the Regional Municipality of Haldimand-Norfolk and the Ontario Nurses' Association and the Pay Equity Hearings Tribunal [now reported as *Haldimand-Norfolk and Ontario Nurses' Association, Re* (1989) 1 P.E.R. 188 (Ont. Div. Ct.)] Both applications were granted by the Court. Ms. LeGault submitted that the Court applied the provisions of Rule 13 of the Rules of Civil Procedure and permitted the intervention because both applicants had an interest in the subject matter of the litigation and they could be adversely affected by a judgement. She also argued that in all likelihood Peat Marwick would obtain standing in this case if it were to proceed to Divisional Court on a judicial review application.

29. In our view, the Tribunal has already dealt with the Divisional Court jurisprudence in our reasons. The intervention application in the *Haldimand-Norfolk* proceedings do not add anything that was not argued at the September 13, 1989 hearing. Furthermore, the decision of Mr. Justice O'Leary is not helpful in that the reasons given for permitting intervention are very sparse. Finally, Rule 13 does not apply to this Tribunal.

30. Ms. LeGault argued that another exceptional factor in this case is that the Tribunal's reasons dated November 15, 1989 involved the interpretation of an external law, the *Statutory Powers Procedure Act*, and thus raises a legal issue. She also argued that section 5 of that statute was not fully argued by all the parties. She submitted that all three parties assumed that the Tribunal has jurisdiction to add parties and intervenors whereas the Tribunal in its decision has decided that it does not have that power under section 5 of the *Statutory Powers Procedure Act*.

31. Ms. Baker submitted that the Tribunal in its reasons dated November 15, 1989 concluded that it does not have the power to add parties either pursuant to section 5 of the *Statutory Powers Procedure Act* nor section 29 of the *Pay Equity Act, 1987*. She further submitted that this was a very major issue of Tribunal policy and procedure.

32. With respect, it is our view that section 5 of the *Statutory Powers Procedure Act* was fully argued before the Tribunal at the hearing. The various interpretations of that provision were provided to the Tribunal and that is reflected in paragraphs 44 to 54 of our reasons. In our view it was not necessary to come to a definitive conclusion on the meaning of section 5 of the *Statutory Powers Procedure Act*. In reviewing section 5, the Tribunal applied both interpretations submitted to us by Counsel and found that in neither case was it appropriate for Peat Marwick to be permitted to intervene in these proceedings. Finally, it is our view that our interpretation of section 29 of the *Pay Equity Act, 1987* contained in paragraph 40 of our reasons is correct in law.

33. Therefore, in light of all of the foregoing, Peat Marwick's request for reconsideration of our decision dated October 17, 1989 is denied.

34. We wish to thank all Counsel for their very able and helpful submissions.

DECISION OF TRIBUNAL MEMBER SHARON LAING, JANUARY 9, 1990:

1. I dissent from the majority on the key finding that reconsideration of the Tribunal's decision denying Peat Marwick's application to intervene is inappropriate in this case. In my view, there has been a sufficient change in circumstances to justify reconsidering that decision. To accept what the majority has found is to dismiss the significance of the events which have occurred since the original application was heard.

2. Before turning to the primary focus of my disagreement, I would like to record my objection to the majority's position on the Tribunal's policy regarding intervention. The majority states at paragraph 25, that there has been in place "a major statement on intervention before Tribunal proceedings". They rely on the oral Ruling in the *Haldimand-Norfolk* case dated June 26, 1989 to demonstrate this. There is nothing in the Ruling that suggests that that panel canvassed or turned its mind to policy considerations concerning intervention. In addition, I note that the panel hearing the Wentworth County Board of Education application (Tribunal File 0004-89) permitted an intervenor to participate in the hearing. Clearly, no definitive policy position is apparent from these disparate results. Be that as it may, I turn now to a consideration of the approach developed by the majority in determining reconsideration applications.

3. At paragraph 7, the majority held that the Tribunal's discretion to reconsider a decision "ought to be exercised only where there are compelling and extraordinary circumstances which make it appropriate to do so." In light of this, the majority enunciated certain factors that are useful in determining whether and/or when the Tribunal ought to exercise this discretion. In my opinion this approach is correct. I am cognizant, however, that as with any new statute, interpretation must be approached in an incremental fashion. I am therefore of the view that although these tests are appropriate to be applied in this determination, they are neither exhaustive nor all-encompassing.

4. While I agree with the general approach of the majority, in applying the second factor to the facts of this case, I find it appropriate to entertain the application for reconsideration. The changed circumstances are such that there is reason to believe the decision should not stand.

5. In my view, the basis for the Tribunal's decision to deny PMSK's application to intervene at first instance was the fact that the issue before us was confined to the particular workplace in question. For instance, at paragraph 81 of that decision, we defined the issue before us as the proposals of a particular employer in a particular workplace, and not the gender neutrality of the Aiken Plan. In reaching our conclusions, we relied (at paragraph 88) upon ONA's request for relief, which I reproduce here:

> A declaration that the comparison system adopted and proposed by the Respondent Employer is gender biased and unlawful in the *circumstances of this case* and cannot be the subject of negotiations or agreement. [emphasis added]

6. Due to the way in which the issue was framed before us, we concluded (at paragraph 126):

> In our view, there is no reason to believe that a decision in this case regarding the Hospital's proposals for a comparison system would apply to other hospitals to which SKEW provides advice. As we have noted earlier, the issue of gender neutrality of a comparison system must be viewed within the context of a particular workplace.

7. Clearly therefore, the issue presented to the Tribunal at that time was precisely targeted at one bargaining unit and one employer. It was on that understanding of the issue, which I shared, that the application to intervene was denied.

8. Since the September 13, 1989 hearing, ONA has proceeded with twelve applications, alleging in each case that the Respondent hospitals have proposed a gender-biased comparison system so fundamentally flawed that it is not appropriate for pay equity negotiations. The methodology proposed by the Respondent hospitals in all twelve cases is the Aiken Plan, marketed by PMSK. Further, ONA has alerted the Tribunal to the fact that they will continue to file applications with the same allegations for a number of hospitals which have proposed PMSK as a comparison system for their bargaining unit members.

9. Two of these applications will now be heard together with the Women's College Hospital case. Therefore, the evidence and argument respecting the gender neutrality of both the comparison system in general and its application to Women's College Hospital will be presented together. It follows then, that the issue before the Tribunal closely approaches the gender neutrality of the methodology of the Aiken Plan in general, irrespective of the particular workplaces at issue.

10. Moreover, when the Tribunal hears these three cases, it will be dealing with a situation which is representative of a great many hospitals in Ontario. At the last hearing date, PMSK hypothesized that the Women's College decision might have a profound impact upon current negotiations with its many other hospital clients. The majority notes that there are approximately 100 hospitals in Ontario which have purchased the Aiken Plan, and it is the methodology of that plan upon which ONA's attack is focused. Therefore, it would seem that we are no longer dealing simply with one employer's proposal for one workplace, but a proposal which is common to the three hospitals before us, and directly applicable to the vast majority in Ontario.

11. At paragraph 18 of the current decision, the majority writes:

> Admittedly, there may be a perception that ONA is attacking the Aiken Plan in general rather than focusing on individual workplaces and the comparison system to be applied to them.

12. Thus, the majority has recognized that the focus of ONA's case will be on the Aiken Plan in general. In light of the nature of ONA's allegations concerning the gender neutrality of the Aiken Plan, the fact that it sought to have those applications consolidated, and the fact that some of its applications will now be heard together, it is unrealistic to claim that the Tribunal's focus will remain on the particular workplaces in question. The majority is disregarding the practical exigencies and consequences of its decision.

13. For the reasons above, I hold that there has been a sufficient change in circumstances for the Tribunal to reconsider its decision to deny Peat Marwick's application to intervene.

Re Haldimand-Norfolk Regional Board of Commissioners' of Police and The Regional Municipality of **Haldimand-Norfolk**, Applicants, **and Ontario Nurses' Association** and Pay Equity Commission, Respondents, and The Metropolitan Board of Commissioners of Police and the Municipal Police Authorities, Intervenors*

High Court of Justice, Divisional Court

Callaghan C.J.H.C., Van Camp and McKeown JJ. November 23, 1989

APPLICATION FOR JUDICIAL REVIEW

G. Sheppard and S. Floras, for the Applicant, Haldimand-Norfolk Regional Board of Commissioners of Police.

J.P. Wearing and J.P.R. Howard, for the Applicant, The Regional Municipality of Haldimand-Norfolk.

M. Cornish, L. Newton, S. Ursel, for the Respondent, Ontario Nurses' Association.

P. Cavalluzzo, K. Schucher, P. Gordon, for the Respondent, Pay Equity Commission.

C.G. Riggs and J.C. Field, for the Intervenors.

L.M. McIntosh, for the Attorney-General of Ontario.

Application of Act - Employer
Judicial Review - Error of Law

The Haldimand-Norfolk Regional Board of Commissioners of Police (the "Police") and the Regional Municipality of Haldimand-Norfolk (the "Municipality") applied for judicial review to quash and set aside the decision of the Tribunal in *Haldimand-Norfolk* (30 June 1989), 0001-89 (P.E.H.T.) [now reported *Haldimand-Norfolk (No.3)* (1989), 1 P.E.R. 17.] wherein the Tribunal held that the Police are part of the establishment of the Municipality and that the Municipality is the employer of the Police for pay equity purposes.

The Divisional Court dismissed the application.

The issue before the Court is what standard of review should be applied to the Tribunal's decision. The Tribunal is protected by a strong privative clause. The question of who is the employer is a question that the legislator intended the

**Motion for leave to appeal to Ont. C.A. to be heard on April 17, 1990.*

tribunal to answer. In these circumstances, the Supreme Court of Canada has made it clear that the Court can only review a decision where the Tribunal has exceeded its jurisdiction by making a patently unreasonable error of law in the performance of its function. The Tribunal reached its decision on a rational basis, and even though it is not necessarily a decision the Court would have arrived at, it is not patently unreasonable under the *Act*. The responsibility of the Municipality for funding makes the circumstances of this case abnormal and there will not be a large number of cases where the *Act* tests will produce a different employer.

Champ d'application de la Loi – Employeur
Révision judiciaire – Erreur de droit

La Commission régionale de police de Haldimand-Norfolk (la «police») et la municipalité régionale de Haldimand-Norfolk (la «municipalité») ont présenté une requête en révision judiciaire pour faire annuler la décision que le Tribunal a rendue dans Haldimand-Norfolk (30 June 1989), 01-89 (P.E.H.T.) [citée maintenant dans *Haldimand-Norfolk (No. 3)* (1989), 1 P.E.R. 17)]. Dans cette cause, le Tribunal a conclu que la police faisait partie de l'établissement que constitue la municipalité et que la municipalité était l'employeur de la police aux fins de l'équité salariale.

La Cour divisionnaire a rejeté la requête.

La Cour devait décider quelle norme de révision devrait être appliquée à la décision du Tribunal. Une clause privative importante protège le Tribunal. La détermination d'un employeur est une question que le législateur a confiée au Tribunal. Dans ces circonstances, la Cour suprême du Canada a précisé que la Cour ne peut réviser une décision que si le Tribunal a outrepassé ses pouvoirs en faisant une erreur de droit manifestement déraisonnable dans l'exécution de son mandat. Le Tribunal a pris sa décision de façon rationnelle. Même si la décision en cause n'est pas une décision que la Cour aurait nécessairement prise, il n'en demeure pas moins qu'elle n'est pas manifestement déraisonnable en vertu de la Loi. La responsabilité qui incombe à la municipalité en matière de financement rend cette cause anormale et il n'y aura pas beaucoup de causes où les tests prévus en vertu de la Loi pointeront vers un autre employeur.

Statutes Referred To

Pay Equity Act, 1987, S.O. 1987, c.34, ss.1, 30.

Police Act, R.S.O. 1980, c.381.

Cases Referred To

C.S.N. Union v. F.T.Q. Union (1988), 95 N.R. 161 (S.C.C.)

Cormier v. Alberta Human Rights Commission (1984), 85 C.L.L.C. 17,003 (Alta. Q.B.)

Paccar of Canada Ltd. (Canadian Kenworth Company) v. Canadian Association of Industrial, Mechanical and Allied Workers, Local 14 (26 October 1989), (S.C.C.) [unreported]

The judgment of the Court was delivered by

McKEOWN J.:–– This is an application for judicial review to quash and set aside a decision by the Pay Equity Hearings Tribunal of the Pay Equity Commission (the "Tribunal") wherein the Tribunal declared that the Haldimand-Norfolk Regional Police Force is part of the "establishment" of the Regional Municipality of Haldimand-Norfolk (the "Regional Municipality") and that the Regional Municipality is the employer of the police force for the purposes of the *Pay Equity Act*, (Ont.) 1987, c. 34 (the "Act").

The issue before the Tribunal was whether or not the Haldimand-Norfolk Regional Police Force should be included in the establishment of the Regional Municipality for purposes of pay equity. "Establishment" is defined in s-s. 1(1) of the Act:

> 1. (1) "Establishment" means all of the employees of an employer employed in a geographic division or in such geographic divisions as are agreed upon under s. 14 or decided upon under s. 15.

By reason of this definition, and because "employer" is not defined within the Act, the Tribunal had to determine who the employer was for pay equity purposes. The issue before us is what standard of review should be applied to the Tribunal's decision.

The Tribunal reviewed the facts in their decision and it is not necessary for me to repeat them here.

The Pay Equity Act

It will be useful to review the legislative framework of this application. The purpose of the Act is to require employers to take affirmative action to redress systemic gender discrimination in the compensation of employees employed in female job classes in Ontario. In order to achieve this broad mandate, all Ontario employers (except private sector employers with less than 10 employees) are required to take pro-active steps to eliminate such wage discrimination within certain statutory time limits. Specifically, they must establish and maintain compensation practices which provide for pay equity in every establishment of the employer.

The employer is to identify systemic gender discrimination in wages by undertaking comparisons between female and male job classes in its establishment in terms of compensation and in terms of value of work performed. This is done by using a gender-neutral comparison system to evaluate job content in terms of skill, effort, response, ability and working conditions.

Where there are no male job classes within a bargaining unit in which the work performed is of equal or comparable value, a female job class should be compared to male job classes throughout the employer's establishment. Once these gender-neutral comparisons have been completed, pay equity is achieved by increasing the wages of any female job class to equal those of the lowest paid male job class which is found to be of comparable value.

While the Act always requires the employers to identify and rectify wage discrimination, it sets up a different implementation procedure where the female job classes are represented by a bargaining agent. Where such employees are represented, employers must bargain in good faith with any bargaining agents to agree on the gender-neutral comparison system and the preparation and implementation of a pay equity plan. A pay equity plan sets out the procedures undertaken to establish pay equity in the work place and identifies the pay adjustment required.

Where female job classes are not represented by a bargaining agent, the employer alone decides on a pay equity plan, subject to a complaint procedure. All public sector employers such as the municipality must post their pay equity plans and start pay adjustments by January 1, 1990.

The Act applies to both organized and unorganized employees.

Tribunal's Tests for Determining the Employer

The Tribunal set out four tests or criteria which should be applied when approaching the question of who is the employer:

1. WHO HAS OVERALL FINANCIAL RESPONSIBILITY?

Indicia of this test include: Who has responsibility for the budget? Who bears the financial burden of compensation practices, and the burden of wage adjustments under the Act? Who is responsible for the financial administration of the budget? What is the shareholder investment or ownership? Who bears the responsibility of picking up the deficit or benefiting from the surplus?

2. WHO HAS RESPONSIBILITY FOR COMPENSATION PRACTICES?

> The indicia for this criteria include: Who sets the overall policy for compensation practices? Who attaches the value of a job to its skill, effort, responsibility and working conditions? What is the labour relations reality, who negotiates the wages and benefits with the union or sets the wage rate in a non-unionized setting?
>
> 3. WHAT IS THE NATURE OF THE BUSINESS, THE SERVICE OR THE ENTERPRISE?
>
> Within this test the following are helpful indicia: What is the core activity of the business, service or enterprise? Is the work in dispute integral to the organization or is it severable or dispensible? Who decides what labour is to be undertaken and attaches that responsibility to a particular job? What are the employees perceptions of who is the employer?
>
> 4. WHAT IS MOST CONSISTENT WITH ACHIEVING THE PURPOSE OF PAY EQUITY ACT?
>
> If there is more than one possible employer, it assists the Tribunal in its determination to make reference to the purposes and objectives of the Pay Equity Act, 1987.

In deciding that it had the discretion to decide who the employer was for the purposes of the Act, the Tribunal stated in applying its four tests:

> ... [it] finds on balance that the Regional Municipality is the appropriate employer. The indicia with respect to overall budgetary control and liability being the responsibility of the Regional Municipality; the active role of the Regional Councillors on the police Board with respect to labour relations and compensation practices; the fact that the Regional Municipality will bear the financial burden of wage adjustments under the Act; the responsibility of the Regional Municipality to provide policing and nursing as part of its municipal function; and considering the purpose of the Pay Equity Act, 1987; the Tribunal finds that the Regional Municipality is the employer in this case. The majority of the Tribunal finds the Applicant has made its case in establishing that the Regional Municipality is the appropriate employer of the police for purposes of the *Pay Equity Act, 1987* and since Subsection 1(1) of the Act defines establishment as all employees of an employer employed in a geographic division, accordingly, we find the police to be part of the Regional Municipality's establishment. The issue of whether job classes of the police force are to be used as male comparators was not before the panel at this time; it will form part of the negotiations these parties undertake and we make no ruling on this.
>
> For the foregoing reasons, the Tribunal finds that the Haldimand-Norfolk Regional Police Force is part of the establishment of the Regional Municipality of Haldimand-Norfolk and that the Regional Municipality of Haldimand-Norfolk is the employer of the police force for the purposes of the *Pay Equity Act, 1987*.

The dissenting member of the Tribunal accepted the four tests or criteria identified by the majority decision but disagreed with the application of the facts in this case to the tests.

Standard of Review

The Tribunal is protected by a strong privative clause. Subsection 30(1) of the Act reads as follows:

> The Hearings Tribunal has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it and the action or decision of the Hearings Tribunal thereon is final and conclusive for all purposes.

In my view, the correct standard of review was enunciated by Mr. Justice Beetz in *C.S.N. Union v. F.T.Q. Union* (1988), 95 N.R. 161 at 205 where he states:

> Did the legislator intend the question to be within the jurisdiction conferred on the Tribunal?

In my view the question of who is the employer is a question that the legislator intended the Tribunal to answer. Mr.Justice La Forest in *Paccar of Canada Ltd. (Canadian Kenworth Company) v. Canadian Association of Industrial, Mechanical and Allied Workers. Local 14 et al.*, a decision of the Supreme Court of Canada, released October 26, 1989, has made it clear that in a case such as this, the court can only review a decision where the Tribunal has exceeded its jurisdiction by making a patently unreasonable error of law in the performance of its function. He states at p. 14:

> Where, as here, an administrative tribunal is protected by a privative clause, this Court has indicated that it will only review the decision of the Board if that Board has either made an error in interpreting the provisions conferring jurisdiction on it, or has exceeded its jurisdiction by making a patently unreasonable error of law in the performance of its function; see *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp*, [1979] 2 S.C.R. 227. The tribunal has the right to make errors, even serious ones, provided it does not act in a manner "so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review" (p.237). The test for review is a "severe test"; see *Blanchard v. Control Data Canada Ltd.*, [1984] 2 S.C.R. 476, at p.493. This restricted scope of review requires the courts to adopt a posture of deference to the decisions of the tribunal. Curial deference is more than just a fiction courts resort to when they are in agreement with the tribunal. Mere disagreement with the result arrived at by the tribunal does not make that result "patently unreasonable". The courts must be careful to focus their inquiry on the existence of a rational basis for the decision of the tribunal, and not on their agreement with it. The emphasis should be not so much on what result the tribunal has arrived at, but on how the tribunal arrived at the result.

The Tribunal reached a decision that the Regional Municipality was the employer for the limited purposes of pay equity only. The Act is only concerned with matters of compensation and does not concern itself with control over employees or hiring and firing. It may very well be that it is not appropriate to use the same tests to decide who the employer is under the Act as under the *Police Act*, R.S.O. 1980,c. 381, as amended. It is clear under the latter Act that the Haldimand-Norfolk Regional Board of Commissioners of Police (the "Board") is the employer.

Both *Cormier v. Alberta Human Rights Commission* (1984), 85 C.L.L.C. 17,003 (Alta. Q.B.) and *R. v. Pereira* (1988), 20 C.C.E.L. 187 (Alta. Q.B.) find that different statutes may require different definitions of employer and employee. The Tribunal reached its decision on a rational basis and even though it is not necessarily a decision which I would have arrived at, it is not patently unreasonable under the Act.

There is nothing in the Act which will affect the historic independence of the police force from control by the municipality. The only possible effect it might have on the collective bargaining agreement between the Board and the Police Association might be to increase the wages of a female job class because a comparator male job class is being paid higher wages. It is the Regional Municipality and not the Board which will have to provide the additional funds. The responsibility of the Regional Municipality for funding makes the circumstances of this case abnormal and there will not be a large number of cases where the Act tests will produce a different employer.

For the foregoing reasons, the application is dismissed with costs to the Ontario Nurses Association from the Board and the Regional Municipality.

Application Dismissed